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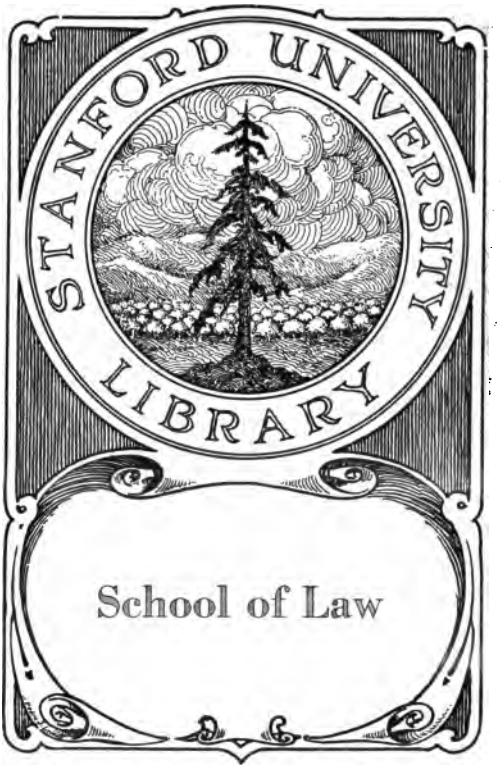

Reports of Decisions,

IN THE

CIRCUIT COURTS MARTIAL.

REPORTS OF DECISIONS

IN THE

CIRCUIT COURTS MARTIAL,

OF

QUESTIONS ARISING ON TRIALS HAD IN SAID COURTS.

Compiled from Original Papers in the Office of the Adjutant General, in conformity to a Resolve of the Legislature of Maine, passed March 31, 1831.

TO WHICH IS ADDED,

An Appendix of Practical Forms of Proceedings in Circuit Courts Martial.

BY FRANCIS O. J. SMITH,
COUNSELLOR AT LAW.

PORTLAND:
PRINTED BY TODD AND HOLDEN.
1831.

DISTRICT OF MAINE—*to wit:*

DISTRICT CLERK'S OFFICE.

BE IT REMEMBERED, That on the twenty-fifth day of August A. D. 1831, Francis O. J. Smith, Esq. of said District, has deposited in this office the title of Book, the title of which is in the words following, to wit:

"Reports of Decisions in the Circuit Courts Martial, of questions arising "on trials had in said Courts. Compiled from original papers in the Office "of the Adjutant General, in conformity to a Resolve of the Legislature of "Maine, passed March 31, 1831. To which is added, an Appendix of "practical forms of proceedings in Circuit Courts Martial. By Francis O. "J. Smith, Counsellor at Law. Portland. printed by Todd and Holden. "1831."

The right whereof he claims as Author, in conformity with an Act of Congress, entitled "An Act to amend the several acts respecting copy rights."

J. MUSSEY, *Clerk of the District.*

A true copy as of record,

Attest, J. MUSSEY, *Clerk of the District.*

PREFACE.

THE documents in the office of the Adjutant General, from which the following Reports have been compiled, were found on examination, with the exception of a few emanating from the President of the First Military Circuit, to be for the most part but little more than informal and imperfect statements of the cases reported, embracing only a brief description of either the merits of the issues, or of the principles involved in the decisions made upon them, and without any show of uniformity in their preparation, or regard to the ultimate intention of their publication. It became, therefore, indispensably necessary, that some new form should be adopted, into which each of them might be modelled, though this could only be done at the expense and labor of transcribing and remoulding them entirely. It has been the constant endeavor of the Compiler, in the performance of this labor, to preserve, wherever practicable, the language of the original documents, and to render the reports as simple and easy to the understanding in every respect as could be desired. With what success this has been accomplished, those interested will judge.

One useful end, at least, will, without doubt be effectuated by the publication;—and this is, it will induce

more care and precision, and quicken a sense of responsibility in the discharge of an essential duty, on the part of those upon whom it is devolved by law to prepare and deposit in the Office of the Adjutant General, formal Reports of the Decisions of the Circuit Courts Martial. To advance uniformity in the proceedings and Reports of these Courts, a brief Appendix of practical forms or precedents has been made, and may not be found without its use to all engaged in the military service of the State.

It is hoped, that this little volume,—the first of the kind ever published under any government—will also be regarded as a new evidence of the disposition of our State Legislators, to foster and build up the Militia, by giving body and character, and a safer and more positive administration, to its system of laws and governing usages, and a wider dissemination of correct knowledge among the people concerning both.

AUGUST, 1831.

ERRATA.

The reader is requested to make the following corrections.—On page 27, in the bottom line, for "office," read *officer*. On page 28, in the fourth line from the top, for "office," read *officer*. On page 63, in the sixth line from the top, for "trial," read *time*. On page 97, in the 22d line from the top, for "this offence," read *the* offence. On page 98, for "Council," read *Counsel*.

A TABLE

OF THE TRIALS REPORTED IN THIS VOLUME.

REPORTS

OF

DECISIONS

IN

THE CIRCUIT COURTS MARTIAL.

First Military Circuit....August 21, 1827.

Present, SAMUEL FESSENDEN, *President.*

JOHN TURNER, } *Associate*
BARNABAS PALMER, } *Members.*

JOHN FAIRFIELD, *Division Advocate, 1st. Div.*

CASE. STATE *vs.* JOSEPH STIMSON, *Brig. Quar. Mas.* } *2d. Brig. 1st. Div.* }

1. An Officer in the Militia of Maine, who was commissioned under the Commonwealth of Massachusetts before the Separation, and then took and subscribed the oaths and declarations then required, does not vacate his commission, nor discharge himself from duty, by neglecting to take the oaths required by the constitution and laws of Maine;—although he cannot act legally until taking the last mentioned oaths.

2. A neglect on the part of the Respondent to file with the Division Advocate, answers to the charges and specifications against him, fifteen days before the day of trial, agreeably to the Statute of 1827, Ch. 367, Sec. 4, is not tantamount to a plea of guilty.

3. The existing Court Martial has not cognizance of any new charge filed by the Division Advocate against the Respondent, whereof notice has not been served on the Respondent thirty days before trial.

THIS was a trial had at a session of the Circuit Court Martial for the First Military Circuit, convened at Bux-

ton, within the First Division of the Militia of Maine, on the twenty first day of August, A. D. 1827.

The Charges, and Specifications, instituted by the Division Advocate, were—

"CHARGE 1st.—That the said Joseph Stimson, at Lim-"erick aforesaid, on the first day of December, 1824, was "guilty of unmilitary conduct and neglect of duty, as "Brigade Quarter Master of the 2d. Brigade, 1st. Di-"vision.

"*Specification 1st.*—For that the said Joseph Stim-"son, then and there neglected and refused to form an "abstract of the returns to him made by the Quarter "Masters of the Regiments composing said Brigade, rela-"tive to the articles of Stores, with their quality and con-"dition, required by law to be provided by towns and "plantations, and an attested copy thereof neglected and "refused to transmit to Nathan D. Appleton, Esquire, "Division Quarter Master for said Division, on or before "the said first day of December.

"*Specification 2d.*—Also for that the said Joseph Stim-"son, at said Limerick, on said first day of December ne-"glected, and from said day hitherto hath neglected, to "record in a Book to be kept for that purpose by said "Stimson, an abstract of the returns to him made by the "Quarter Masters of Regiments composing said Brigade, "relative to the articles of Stores, with their quality and "condition, required by law to be provided by towns and "plantations.

CHARGE 2d.—Was the same as the first, excepting only in that it related to December 1825; and the two specifications under it were the same as the preceding two, excepting as to the year.

CHARGE 3d.—And the two specifications under it, were the same as the preceding, excepting only in that they related to the year 1826.

J. Howard, Esq. Counsel for the Respondent, object-

ed, that the Respondent was not answerable to the jurisdiction of the Court, for the reason that he was not an officer in the Militia of this State.

The testimony in relation to this point was as follows: The Respondent was commissioned in 1815, under the Commonwealth of Massachusetts, Brigade Quarter Master of said Brigade. It appeared by his commission, that he took and subscribed the oaths and declarations required under that Commonwealth, on the fifteenth day of December, 1815. It further appeared in evidence, that he had never taken the oath to support the constitution of the United States, or of this State, since Maine became a State.

It was contended in behalf of the Respondent, that his neglect to take the oaths required by this State, rendered his commission a nullity; and although he had acted as Brigade Quarter Master, his acts were unauthorized.

The case of Col. Bradley,* Division Inspector of the sixth Division, was relied on as a practical construction of the law, which ought to have the weight of a judicial decision.

But the Court ruled unanimously, that the Respondent's neglect to take the oaths required by this State, did not vacate his commission, or discharge him from his duty;—that the neglect of one important duty could not operate as an excuse for the neglect of other duties, although he could not, until qualified by taking the oaths, legally act under his commission.

The objection being thus over-ruled by the Court, the Respondent pleaded *not guilty* to all the charges.

* Col. Bradley was commissioned and qualified before the Separation of Maine from Massachusetts; and after the separation, declined to take the oaths of office anew, as required by the constitution of Maine. Under these circumstances the Major General of the Division appointed another person to the office of Division Inspector, who was commissioned by the Governor, in the same manner as if the office had been vacant. *Ed.*

The Division Advocate then contended, that as the Respondent had not furnished him with a written answer to the charges, fifteen days before the time of trial, agreeably to Sec. 4, ch. 367, and Statute of 1827, the charges should be taken as confessed by the Respondent.

On this point the Court ruled unanimously, that a neglect to file such answer could not be considered tantamount to a plea of guilty. And that it was incumbent on the Division Advocate to make out a case for the State, by exhibiting proof in support of the charges and specifications.

It was then proved in behalf of the State, that in 1824, and in 1826, the Respondent had neglected to make returns to the Division Quarter Master, as by law required. But there was not satisfactory proof that he had so neglected to make returns in 1825.

The Court decided, that the charge of neglect of duty in 1824 was barred by the limitation of the Statute of 1821, Ch. 144, Sec. 45, Art. 5*—there not having been two *successive* years in which the duty had been neglected, according to the evidence.

The Division Advocate then filed a new charge against the Respondent, for neglect of duty and unmilitary conduct, in that he neglected to answer the before named charges and specifications in writing, and deliver the same to the Division Advocate, fifteen days before this trial.

But the Court were of opinion, that they had not cognizance of this charge, for the reason that the Re-

* The Article referred to is as follows :—"No officer shall be tried by a "Court Martial for any offence which shall have been committed more than "one year, previous to the time when a complaint shall have been made in "writing therefor, unless he shall have repeated such offence in two or more "successive years, or by reason of having absented himself, or some other "manifest impediment, shall not have been amenable to justice within that "period."

spondent had not the thirty days notice thereof which the Statute prescribes; and the Respondent refused to plead to the same for that reason.

The Respondent being adjudged by the Court guilty of the first specification of the third charge, and not guilty of the other several specifications, was sentenced to be removed from office, and to be disqualified from holding any military office under this State, for the term of one year.

First Military Circuit....June 3d, 1828.

Present, SAMUEL FESSENDEN, *President.*
JOHN TURNER, } *Associate*
BARNABAS PALMER, } *Members.*
JOHN FAIRFIELD, *Division Advocate, 1st. Div.*

CASE. STATE *vs.* JEREMIAH MCINTIRE, *Quar. Mastr. 1st. Reg. 1st. Brig. 1st. Divn.*

1. The Commanding Officer of a Regiment may lawfully order the Quarter Master to proceed to the Colonel's Quarters, and bring on parade the sword of the Lieutenant Colonel.

This was a trial had at a session of the Circuit Court Martial for the First Military Circuit, convened at Alfred, within the First Division of the Militia of Maine, on the third day of June, 1828.

One of the Charges, and the Specification under it, were as follows:—

"CHARGE 1st.—That the said Jeremiah McIntire at "York aforesaid, on the twenty seventh day of September, "A. D. 1827, was guilty of Disobedience of Orders.

"*Specification.*—For that the said Jeremiah McIntire "at said York, on the day aforesaid, the said Regiment "being then and there paraded for Review and Inspec- "tion, and the said McIntire, as Quarter Master, being "then and there on duty in said Regiment, and being or- "dered by Colonel Jeremiah Brooks, Commanding Officer "of said Regiment, to proceed to the Colonel's Quarters, "at the distance of about eighty rods, and to bring on "parade a certain sword left there by, and belonging to, "the Lieutenant Colonel of said Regiment; the said Mc- "Intire then and there in contempt of said order, and in "the hearing of the other Staff Officers, and in the face "of the Regiment, peremptorily refused to obey said or- "der."

The Counsel for the Respondent contended, that the Commanding Officer of the Regiment had no power to issue the order for disobedience of which this charge was made.

But a majority* of the Court ruled, that the Order was within the scope of the power of the Commanding Officer of the Regiment, and over-ruled the objection. And on this, and other charges, the Respondent was adjudged to be guilty, and sentenced to be reprimanded in orders.

CASE. STATE *vs.* ISAAC T. CARPENTER, *Lieut. 2d. Regt. 2d. Brig. 1st. Div.*

1. Division, nor Brigade Orders, need not be produced to prove a Regimental Order to have been regularly issued.
2. A Regimental Order may be legally transmitted through an Officer of the line, or a Private.
3. It is the duty of the Colonel to detach the oldest Captain to fill a vacancy on parade in the office of Lieutenant Colonel, or Major.
4. Such detachment should be made before the line has been formed, if the vacancy be known to the Commandant of the Regiment.

This was a trial had in the Circuit Court Martial for the First Military Circuit, convened at Alfred on the third day of June, 1828, on several charges and specifications against the Respondent, for Disobedience of Orders—Neglect of Duty, and Unmilitary Conduct, at a Regimental Review and Inspection had at Parsonsfield, within the limits of the Second Regiment, Second Brigade and First Division. In the absence of the Major, the Commanding Officer of the Company, of which the Respondent was Lieutenant, was detached to act as Major, which devolved the command of said Company for the time on the Respondent.

*The papers in this case, deposited in the office of the Adjutant General, do not shew which member of the Court dissented from this decision. Nor who was Respondent's Counsel.—*Ed.*

The Respondent pleaded not guilty to all the charges; and on the trial it was contended by the Counsel for the Respondent,

First, That it was incumbent on the Division Advocate to produce the Division and Brigade Orders, or copies thereof, on which the Regimental Order was founded.

The Court unanimously over-ruled this position, and decided that it is not necessary to produce either of those Orders, inasmuch as the law requires that the Regiment shall be called out annually for Review and Inspection. The Court would presume that the Division and Brigade Officers had issued the necessary Orders, as the Regimental Order appeared to be predicated on such Orders.

Secondly, It was contended that the Respondent was not bound to obey the Order, because the same was not transmitted through the Adjutant, or some Officer of the Staff.

On this second point, the Court ruled, that the Regimental Order might legally be transmitted through an Officer of the line, or a private, and more especially as the Adjutant was absent on a journey.

Thirdly, It was contended by the Counsel for the Respondent, that the Colonel had no power in the absence of the Lieutenant Colonel, or Major, to detail the oldest Captain on the field, or any other officer, to supply the vacancy during the day of Review and Inspection.

On this third point, the Court decided, that it was the duty of the Colonel to detach the oldest Captain on the field to supply the vacancy during the day.

Fourthly, It was contended by Respondent's Counsel that it was not in the power of the Colonel to make such detachment, until the line had been formed.

But the Court decided, that it was in the power of the Colonel to make such detachment before the line was formed. And that if he know one of the Field Officers to be absent, it is the duty of the Colonel to do so.

State *vs.* Isaac T. Carpenter.

The Respondent was adjudged guilty of all the charges and specifications except one, and sentenced to be removed from office, and incapable of holding any military office under this State for the term of twenty years.

NOTE. In the preceding case, no statement of the evidence had therein on trial, was returned to the office of the Adjutant General, in connection with the Report of the points raised and decided as above mentioned, to elucidate them. Nor does it appear from the papers, who was Counsel for the Respondent. *Ed.*

Second Military Circuit....June 3d, 1828.

Present, WILLIAN KING, *President.*
EBENEZER HUTCHINSON, *Associate Member.*
GEORGE EVANS, *Div. Adv. 2d. Div.*

CASE. STATE *vs.* Captains JOSIAH MURCH and REUBEN BAGLEY, *3d. Regt. 2d. Brig. 2d. Div.*

1. Amendments to specifications may be made on motion, by notice thereof to the Respondent—he being absent.

These were trials had at a session of the Circuit Court Martial, for the Second Military Circuit, convened at Augusta, within the Second Division of the Militia of Maine, on the third day of July 1828.

The specifications of the charges preferred against the Respondents severally, alleged the offences by them supposed to have been committed, as having been committed at "*Troy*," in the County of Waldo. Captain Murch appeared at the time of trial and answered in defence. Captain Bagley did not appear.

The Court upon motion of the Division Advocate, granted an amendment in the first specification of the first charge against Captain Murch by striking out the word "Troy," and inserting in lieu thereof, the word "Unity," Captain Murch consenting thereto.

The Court also, upon motion of the Division Advocate, granted a similar amendment in the specifications of charges against Captain Bagley, and directed that seasonable notice should be given to Captain Bagley of the amendment made in the specifications of the charges against him. The Court adjourned until the eighth day of July following, first directing that Captain Bagley

should be further notified of the time and place to which the Court adjourned.

At the adjournment Captain Murch again appeared, and his trial proceeded on the charges and specifications as amended;—and, being adjudged guilty thereof by the Court, was sentenced to be removed from office, and disqualified from holding any military office under this State for the term of two years.

Captain Bagley did not appear at the adjournment. But satisfactory evidence being adduced by the Division Advocate, that he was duly served with a copy of the General Order convening the Court, and with a copy of the charges and specifications preferred against him, and had also been duly notified of the time and place to which the Court would convene by adjournment, and of the amendments which had been made in the specifications of charges preferred against him; and evidence being adduced, of the truth of those charges and specifications, the Court adjudged him guilty thereof, and sentenced him to be removed from office, and incapable of holding any military office under this State for the term of four years.

Third Military Circuit....June 4, 1828.

Present, JEDEDIAH HERRICK, *President.*

CHARLES PEAVY, } *Associate*
ALFRED JOHNSON, Jr. } *Members.*

ANSON G. CHANDLER, *Division Advocate, 7th. Div.*

CASE. STATE *vs.* EBENEZER BUCK, *Captain 1st. Reg. 1st. Brig. 7th. Div.*

1. Battalion Companies take the rank of the officers present commanding them; Light Companies, detached as such, are exceptions to the rule.

This was a trial had at a session of the Circuit Court Martial, for the Third Military Circuit, convened at East Machias, within the seventh Division, on the fourth day of June, 1828.

The Charge and Specifications were for Disobedience of Orders, and Neglect of Duty. The Respondent admitted the truth of the Charge and Specifications, and justified himself on a statement of facts agreed to by the Division Advocate. The Statement thus agreed upon, presented the following facts:—

The Company commanded by the Respondent was on parade for Regimental Review and Inspection, with the Regiment to which it belonged. The Respondent was ordered by his Superior in command, to post his Company for Review and Inspection on the Right of the Battalion. A Light Infantry Company, commanded by a Junior Officer, had been previously posted as a detached corps, on the Right of the Battalion, sufficiently distant to leave an intervening space for the Respondent's Company, and the Battalion Music. The Respondent refused to obey the order, alleging that the Light Infantry Com-

pany on the Right of the Battalion was not, in fact, detached from the Battalion, and separate from it, sufficiently obvious and certain ; and that, therefore, he could not take the position assigned him by the order, without sacrificing his rank, which he was not bound to do.

In support of his defence, the Respondent cited Statute of 1821, Ch. 164, Sec. 10—also, Sec. 45—Articles 16 and 20, of the same Chapter.

The Court over-ruled the defence, and decided, That Battalion Companies take the rank of the Officers present commanding them. But Light Companies, detached as such, are an exception to the rule.

The fact that such a Company is detached from the Battalion, and therefore properly posted on the Right, does not depend upon the intervening space ; but upon the order and declaration of the officer commanding the parade. The arrangement is subject to his discretion. The order of the commanding officer in this case was correct, and should have been obeyed.

The Respondent was adjudged guilty, and sentenced to be reprimanded in orders.

Third Military Circuit....July 29th, 1828.

Present, JEDEDIAH HERRICK, *President.*
ALFRED JOHNSON, Jr. *Associate Member.*
HIRAM O. ALDEN, *Division Advocate, 3d. Div.*

CASE. STATE *vs.* JONATHAN HASKINS, *Major Batt. Cav. 2d. Brig. 3d. Div.*

1. The effect of the Respondent's omission to file answers to the charges and specifications preferred against him, upon his right to defend himself on trial. *Quere.*

This was a trial had at a session of the Circuit Court Martial, for the Third Military Circuit, convened at Bangor, within the Third Division of the Militia of Maine, on the twenty ninth day of July, 1828.

The Charges and Specifications set forth, Neglect of Duty on different occasions, and Disobedience of Orders, on the part of the Respondent as Major of the Battalion of Cavalry, in the *Second* Brigade and Third Division of the Militia of this State.

To all of which the Respondent answered, that "he is not guilty, because he was not on the nineteenth day of September last, nor has he been at any other time, before or since, a Major of the Battalion of Cavalry in the *Second* Brigade of the Third Division."

The evidence in the case was, that the Respondent had been commissioned as Commandant of the Battalion of Cavalry in the *First* Brigade and Third Division. That a General Order was issued June 28, 1827, and passed down by a Division Order, dated July 9, 1827, transferring Respondent and his Staff from the *First* to the *Second* Brigade;—That the Major General of the before named Division informed the Respondent *verbally* of the exist-

ence of the General Order. But there was no evidence that the written Orders, or either of them, ever reached the Respondent.

The Court intimated an opinion, that the evidence was not sufficient to convict the Respondent, for Neglect of Duty or Disobedience of Orders, as Major of a Battalion of Cavalry in the *Second* Brigade, and, on motion therefor by the Division Advocate, agreed to adjourn to a future day. But the motion was afterwards withdrawn, and a *nolle prosequi* entered by the Division Advocate. Whereupon the Respondent was discharged.

In the opening of this case a question* was raised by the Division Advocate, as to the effect of the failure of the Respondent to file his answer to the Charges and Specifications fifteen days before the day of trial, with the Division Advocate.

Johnson, Associate Member of the Court, was of opinion, that the Respondent, by this neglect, was precluded from the right to be heard at all in his defence, or to answer in any form, to the Charges exhibited against him. That the Court should receive testimony to prove his guilt, without which he could not be subjected to punishment; but he had no right to produce exculpatory testimony, or to cross examine witnesses introduced by the Government. That he might be permitted to answer and defend as a matter of favor, but could not claim it as a right.

Herrick, President, dissented from the opinion given by Major Johnson. He agreed in the opinion that no sentence could be awarded, but upon proof of guilt. And hence he inferred, that if the Respondent appeared, his answer must be received and his defence heard and considered by the Court. The Statute has made it the

*This question was decided by the Court in the First Military Circuit, in the case of the *State* vs. *Stimson*—reported in this volume; also by the Court in the Second Circuit, in the case of the *State* vs. *Allen*, which is likewise reported in this volume. *Ed.*

duty of the Respondent to file his answer to the charges preferred against him, fifteen days previous to the time appointed for his trial. But the neglect of this duty does not impair his right to appear and defend himself before this Court. The law has annexed no penalty to this offence; and the Court has no power to supply, by construction, what they might deem a defect in Legislation.

Peavy, Associate Member of the Court, not being present, the question remained undecided. But the Report of the case by the President adds, that "the practice of the Court has been to receive the answer of the Respondent, in such case, and proceed in the trial as if it had been filed according to the Statute—with the understanding, that the Division Advocate may claim a postponement of the trial at any stage of it, should it appear necessary for the procurement of additional testimony.

Third Military Circuit....August 5th, 1828.

Present, JEDEDIAH HERRICK, *President.*
ALFRED JOHNSON, Jr. *Associate Member.*
HIRAM O. ALDEN, *Division Advocate, 3d. Div.*

CASE. STATE *vs.* JOSEPH P. PARKER, *Col. 4th. Reg. 1st. Brig. 3d. Div.*

1. The omission of Subaltern Officers to make returns of the state of their Companies to the Commander of the Regiment to which they belong, proves culpable negligence in the discipline of the Regiment, and furnishes the commandant thereof no justification for omitting to make returns to his superior, as required by law.

This was a trial had at a session of the Circuit Court Martial, for the Third Military Circuit, convened at Belfast, within the third Division of the Militia of Maine, on the fifth day of August, 1828.

The Respondent was charged with Neglect of Duty, in not causing a return of the state of his Regiment to be made, and a copy thereof to be transmitted to the Commanding Officer of the Brigade to which said Regiment belonged, for the year 1827, as required by law.

Also for Disobedience of Orders, in not meeting with his Regiment assembled for Review and Inspection on the eighteenth day of September, 1827, as ordered to do by his superior in command.

To the first charge the Respondent answered, that he is not guilty, because he says that, having received no returns from the Officers whose duty it was to make them to him, he could make none but a blank return to his superior.

To the second charge he answered, that he is not guilty, because he says he was unwell and unable to perform his duty, as Commander of the Regiment.

In relation to the first charge, the evidence of the Adjutant of the Regiment was, that no returns had been received from the Companies composing the Respondent's Regiment, or transmitted to the Brigadier General, for the last two years.

In relation to the second charge, it was in evidence, that the Respondent was somewhat indisposed;—that his voice was affected by a cold. He had issued the proper order for the Inspection and Review of his Regiment—but did not attend thereto in person. It was further in evidence, that on the day of the Inspection and Review of his Regiment, the Respondent was engaged in important private business at Castine; but, that his attention to it at that particular period, was not indispensably necessary.

The Court decided, that the justification set up by the Respondent as to the first charge, was not sufficient. The facts disclosed prove a culpable negligence in relation to the discipline of his Regiment, and do not excuse him at all for neglecting to send up such returns as were at his command.

In relation to the second charge, the Court decided, that the Respondent did, unnecessarily, absent himself from the Parade of his Regiment, but under such circumstances as satisfied the Court that the Respondent did not, at the time, consider his absence unnecessary or unjustifiable. He was sentenced by the Court to be reprimanded in orders.

Third Military Circuit....December 1828.

Present, JEDEDIAH HERRICK, *President.*
CHARLES PEAVY, } *Associate*
ALFRED JOHNSON, JR. } *Members.*
HIRAM O. ALDEN, *Division Advocate, 3d. Div.*

CASE. STATE *vs.* ISAAC WOODMAN, *Colonel 1st. Reg. 2d. Brig. 3d. Div.*

1. The superintending authority of the Major General over a portion of his Division on duty, must be exercised through the Officer immediately commanding the corps.
2. To entitle the Major General to the obedience of his subordinate Officers, his commands must be lawful and reasonable.
3. An improper assumption of command over a Regiment by the Major General, does not operate as a suppression of the rights or obligations of the Colonel of the Regiment.

This was a trial had at a session of the Circuit Court Martial, for the Third Military Circuit, convened at Belfast, within the third Division, on the thirtieth day of December, 1828.

The Charges and Specifications against the Respondent were as follow:—

"CHARGE 1st.—Neglect of Duty."

"*Specification:* In this, that the said Isaac Woodman "did on the eighteenth day of September, A. D. 1828, "neglect to parade his said Regiment for Inspection and "Review, after having notified them to appear at Belfast "upon the Regimental Parade ground on said 18th day "of September; and did then and there neglect to lead, "order and exercise his said Regiment as required by "law and the orders and commands of his superior Offi- "cers."

"CHARGE 2d.—Disobedience of Orders."

"*Specification:* In this, that the said Isaac did, on the

"said 18th day of September, on the Regimental parade "ground, at Belfast, on which was assembled his said "Regiment, refuse to obey and execute the orders and "commands of his superior Officers, as by law and milita- "ry usage he was required to do, and left said parade "ground in an insubordinate manner, contrary to that "conduct which is becoming a good Officer."

"CHARGE 3d.—Exciting and Encouraging to Mutiny."

"*Specification:* In this, that the said Isaac did, on the "said 18th day of September, on the Regimental parade "ground of his said Regiment, at said Belfast, encourage "the Officers and soldiers of his said Regiment to disobey "the orders and commands of their superior Officers, and "did then and there excite them to Mutiny against their "authority, to the subversion of all order and subordina- "tion among the officers and soldiers of his said Regi- "ment."

"CHARGE 4th.—Mutiny."

"*Specification:* In this, that the said Isaac did, on the "said 18th day of September, on the Regimental parade "ground of his said Regiment, at said Belfast, Mutiny "against the authority of his superiors in command, and "refuse obedience to, and left the field in contempt of, "their orders and authority."

To these several Charges and Specifications the Respondent pleaded, *Not Guilty.* And—

Upon the first, third and fourth of the foregoing charges, the Respondent was acquitted by the Court.

Two distinct offences were attempted to be proved under the second charge, respecting which the evidence was as follows:—

The Regiment commanded by the Respondent was assembled for Review and Inspection, on the morning of the eighteenth of September, 1828, in pursuance to orders of the Major General, in which he gave notice that he should attend and Review the troops in person. The

ceremonies of the Review had been conducted in good order, when the Major General ordered the Respondent, as Colonel, to prepare his Regiment for Inspection. Respondent thereupon ordered his Regiment to break into open columns of Companies for Inspection, by wheeling on the *Left backward.* The line had broken out, and the Regiment was in the act of executing the evolution, when the Major General rode up, using language somewhat hasty and intemperate to the Respondent, and ordered the Respondent to bring his Regiment again into line. Respondent hesitated to obey the order, and attempted to convince the Major General that he, the Respondent, was right; but was stopped by the Major General, who rapidly repeated his order several times, and assumed personal command of the Regiment—brought it into line—ordered some parts of the manual exercise, and, finally, wheeled it by Companies on the *Right forward.*

Afterwards, and before the Inspection was closed, Respondent dismissed Captain Pattee's Company, it being one of the companies belonging to the Regiment; and also declared his intention to dismiss the Regiment. But it was not proved that Respondent did actually dismiss any other than Captain Pattee's Company.

At the close of the Inspection, the Major General sent an order by his Aid, to the Respondent, requiring him to resume the Command of the Regiment; which order the Respondent refused to obey, and immediately left the parade.

The Counsel for the Respondent, *William Crosby*, Esq. contended, 1st, Inasmuch as the 31st Section of the Militia law, which provides for the Annual Review and Inspection of the Militia, provides for notice to the Major General of the place of Review and Inspection of a Brigade, the Major General was the proper reviewing office of a Brigade; and inasmuch as the same Section

provides for notice of the place of a Regimental Review and Inspection to the Brigadier General, and not to the Major General, the Brigadier General was the proper reviewing office at a Regimental Review; and that, therefore, the Major General was not, in the contemplation of the law, present at this Regimental Review, in any other capacity than that of a distinguished military citizen, and simply entitled to such courtesy as was due to his rank, but to no command.

2dly. If the Major General was the proper Reviewing Officer, and entitled to the obedience of the Colonel, as his superior officer, his order to the Colonel to countermand his order to the Battalions, to prepare for Inspection by wheeling on the left of Companies, *backward*, was illegal, for the reason that the Colonel's order was in strict conformity with Maltby's system of Tactics in use under the General Order of the Commander in Chief. It was confidently relied on by the Respondent's Counsel, that the Major General could not lawfully issue an order, on the field of parade, in contravention of the General Orders of the Commander in Chief, independent of the impropriety of introducing a new system of Tactics on the field of parade, without previous notice.

3dly. If the order of the Major General was legal, yet he did not give the Colonel time to respectfully remonstrate against said order, and to show that his, the Colonel's, order was in compliance with Maltby's directions;—but took the personal command of the Regiment before the Colonel had a reasonable time to comply with the order of countermand; and, therefore, the Respondent is not guilty of disobeying this order.

4thly. As to the Major General's order to the Colonel, after the Inspection, to resume command of the Regiment, and bring them into line, Respondent's Counsel contended, that the Respondent was not bound to resume a command which the Major General had illegally taken from

him. Besides, if disposed so to do, he could not, inasmuch as previous to that time he had dismissed the several Companies of the Regiment, as he had a right to do in justice to himself and them. Under the existing circumstances he was bound to do so.

The Division Advocate in reply. It has been argued by Respondent's Counsel, that the Major General had no right to command the Colonel's Regiment, or control him, or direct in what manner any evolution should be performed by the Regiment. Let us inquire for what purpose the Major General was on parade? Was he a spectator merely? It appears he called out the Colonel and his Regiment—that he gave notice that he should be present and review and inspect the troops. He then was the *reviewing* officer. The Brigadier General was not present. As a reviewing officer, his object was to ascertain the discipline, as well as the equipments, of his troops. Would it not then be preposterous to contend, that the Major General, as the reviewing officer, had not authority to command the Colonel to execute any order relating to the manœuvering of his Regiment? It appears from testimony, introduced as to usage of officers in such cases, that a refusal under the circumstances in which the Colonel was placed, ought to be considered a disobedience of orders. The Colonel was not degraded or disgraced, because his troops were as much bound to obey the Major General as they were to obey their Colonel. He had an opportunity to obey the order, which was subsequently obeyed by the officers of the Regiment, except by Captain Pattee and his subalterns. What excuse then can the Respondent offer for his disobedience? Sure it was no time, nor place, to hold an argument, as to the propriety of the Major General's order. The Respondent was at liberty to elect whether or not he would obey it.

Again. The Respondent left the parade, and refused

to resume command of his Regiment, after the Inspection duties were completed; and conducted himself in a mutinous manner, in passing through his Regiment conversing with his officers—telling them they were dismissed, &c. which was contrary to the conduct of a good and faithful officer. And if the objection, that the former order was not supported by the Tactics as laid down by Maltby is, in the opinion of the Court, a sufficient justification for his disobedience, it still would seem that no good reason can be offered for his disobedience to the subsequent order. He was directed by the Major General to bring his Regiment into line after the Inspection, without specifying the manner in which the evolution should be performed. This the Respondent refused to do. If the Major General had any authority at all over the Colonel, here was a lawful and legitimate exercise of it. It is not for the Colonel to say, that the Major General had been guilty of usurpation, or oppressive conduct, for the Major General is not on trial for any offence; it can therefore be no justification for Respondent's refusal to obey a subsequent lawful order, to say the Major General had usurped command. It is conceived, that in any view which can be taken of the evidence, the Respondent must be convicted of *disobedience of orders*, if not of mutiny and exciting to mutiny.

The Court adjudged the Respondent guilty of disobeying the last mentioned order, under the Second Charge. The opinion of the Court was given as follows:—

In coming to this result, the Court recognise the superintending authority of the Major General over a portion of his Division on duty under his orders—to be exercised, however, through the proper officer immediately commanding the Corps. But to entitle him to the obedience of his subordinate officers, his requirements should be lawful and reasonable; especially, in the Militia, among Citizen soldiers, in the performance of their ordinary

duties, the rights and the character of every individual should be scrupulously and respectfully regarded.

Commands which tend to vex, and harrass, and embarrass an officer in the regular and orderly discharge of his duty;—to degrade or disgrace him, or to bring him into contempt in the presence of his troops, are positive injuries, to which he is not obliged to submit. They are not among those just and reasonable requirements to which he is at all times bound to yield his implicit obedience. He may, to be sure, obey the order, and seek his remedy against the oppressor; and this is manifestly the safer course in all cases not involving a violation of the laws of the land, or the peace of society. But it is apprehended, that he may also, at his peril, withhold his obedience, and rest his defence with the laws and tribunals of his country.

In the case under consideration, the Respondent was in the orderly performance of his duty, executing an evolution pertaining to the services of the day, in conformity with the system of discipline and Tactics practised in his Regiment, and established by an order of the Commander in Chief; and the Court have not been able to perceive the necessity of the Major General's interference in a manner calculated rather to interrupt, than to aid, in the orderly discipline of the Regiment.

But while the Court are disposed, under all circumstances, to consider the Respondent excusable at the time alluded to, they are compelled to pronounce a different judgment upon his subsequent conduct.

His defence is, that he had been put out of his command by the Major General, and was not obliged to reassume it at the pleasure of the Major General.

It is in evidence, that the Respondent's command, as Colonel of the Regiment, had been assumed and exercised by the Major General. But it does not follow, that an improper assumption of authority on the part of the

Major General, operated as a suspension of the Respondent's rights and obligations as Commanding Officer of the Regiment. Such indeed seem to have been the views of the Respondent himself in dismissing Captain Pattee's Company. An act, which, however reprehensible it may have been, must have originated in the opinion, that he still possessed the rightful command of his Regiment. The Respondent had not been arrested, nor is it proved that he had dismissed his Regiment. He ought, therefore, to have obeyed the order.

CASE. STATE *vs.* SUMNER PATTEE, *Captain*,
BALDWIN MUSSEY, *Lieutenant*,
WARD MAXCY, *Ensign*,
1st. Reg. 2d. Brig. 3d. Div.

1. Offences technically denominated *Mutiny*, and *Exciting to Mutiny*, can only be committed in the Militia, when in actual service.
2. On demurrer to Specifications for want of certainty, the Court will on motion order more definite Specifications to be filed.
3. Respondents may consistently with principles recognized by Military Courts, be held on demurrer to answer over to the merits of Charges and Specifications.
4. Subaltern Officers are only amenable to the orders of superior Officers through those in immediate command over them.

These were trials had at the same time, on similar Charges and Specifications preferred against the Respondents severally, in the Circuit Court Martial for the Third Military Circuit, commenced at Belfast on the thirtieth day of December, 1828.

The Charges and Specifications preferred against the Respondents severally, were as follows, *mutatis mutandis*:—

"CHARGE 1st.—Neglect of Duty and Disobedience of "Orders."

"*Specification:* In this, that the said Sumner Pattee "did, on the 18th day of September, A. D. 1828, at said "Belfast, neglect and expressly refuse to obey, and exe- "cute the commands of his superior Officers, then and "there given, on the Regimental parade ground of the "said First Regiment, as by law and the express orders "of his superiors in command, he was bound and requir- "ed to do."

"CHARGE 2d.—Mutiny and Exciting to Mutiny."

"*Specification 1st.*—In this, that the said Sumner did, "on the said 18th day of September, at said Belfast, Muti- "ny against the authority of his superior Officers, and "refuse obedience and subordination to their orders and "commands."

"*Specification 2d.*—In this, that the said Sumner did "then and there excite and encourage the Officers and "Soldiers of his said Company, to Insurrection and Muti- "ny against the express commands and authority of their "superior Officers, to the subversion of all order and sub- "jection among his said troops."

To which Charges the Respondents severally pleaded, that they were not bound in law to answer, by reason of the total want of certainty in the description of the offences alleged against them; and also, because they said no such offences as *Mutiny*, or *exciting to Mutiny*, are recognized in the Rules and Articles for governing the Militia when not in actual service; nor can such crimes exist or be committed in the Militia, in time of peace and not in actual service. And as a further answer, the Respondents pleaded severally, that they were Not Guilty.

It was agreed by the Division Advocate, and the Respondents, and assented to by the Court, that the Respondents should be tried together, with all the advantages of a separate trial reserved to each; and further, that the facts in the cases should be examined without prejudice to the Respondents, who were to be entitled to the same

adjudications as though the Demurrer had been tried first.

It appeared in evidence, that the Respondents were Officers of a Company of Infantry, in the first Regiment, second Brigade and third Division of the Militia of Maine. That the Colonel of said Regiment, Isaac Woodman,* pursuant to Division Orders, had his Regiment assembled on the eighteenth day of September 1828, at Belfast, for Review and Inspection, and did order, direct and discipline the same, in the way and manner pursued previously with the same Regiment, and until after the Regiment had been Reviewed by the Major General, Brigadier General and other Reviewing Officers. The Regiment had also been formed in line, preparatory for Inspection. The Officers, however, pursuant to what was supposed to be required in the Division Orders, were inspected before the line was broken into open columns. The Colonel gave the order, to prepare for Inspection, by wheeling in Companies on the *Left backward.* Thereupon the Major General rode up, said he would have no backward wheeling, and after some few words with the Colonel, assumed personal command of the Regiment. Afterwards, and while the Regiment was under Inspection, and after the Company under the command of the Respondents had been Inspected, the Colonel dismissed it, and the Captain marched it out of the line. The Major General, through the Lieutenant Colonel, the Colonel having refused to resume command, and also in person, ordered Captain Pattee, one of the Respondents, to join the Regiment and bring his Company into line, which he refused to do—alleging that he had been dismissed with his Company, by the Colonel. Captain Pattee was thereupon *verbally* arrested by the Major General, who then passed the order to bring the Company into line, to Lieutenant Mussey—one of the Respondents; who also

*Vide Report of trial, State *vs.* Isaac Woodman, reported in this volume.

refused to obey it, and was arrested in the like manner. The order was then passed to Ensign Maxcy, who also refused to obey it, and was thereupon arrested *verbally*. The Orderly Sergeant dismissed the Company. During these transactions, the actions and language of the Major General were rapid, intemperate and unusual. His conversation with the Colonel did not exceed two minutes, before he assumed the command of the Regiment. It was admitted in evidence, that Maltby's System of Tactics had been in use in the Regiment ever since the year 1814, and was then in use under a General Order of the Commander in Chief; and that the Colonel's Order to the Regiment was in accordance with Maltby's direction. The Division Order in the case was only for Inspection and Review, and neither the General Orders, nor any orders under them, specified any manœuvres to be performed on the day.

Upon these facts, the Counsel for the Respondents, *William Crosby*, Esq. contended, that this Court, deriving its existence from the Statute law, which does not prescribe the rules of its procedure, must be regulated and governed by the rules and proceedings of our Courts of Common Law—and cited H. Blackstone's Reports, vol. 2, p. 100—Maltby on Courts Martial, p. 1. That at common law, these Charges and Specifications were not sufficiently certain and specific to compel the Respondents to answer them. H. Blackstone's Rep. vol. 2, p. 89—Dane's Abr. vol. 6, p. 338—Maltby on C. M. p. 20—Statute of Feb'y 24, 1827, sec. 4, ch. 367.

That Martial Law, in the most extensive meaning of the term, can exist only when the Civil Law is suspended, and the Military is superior to the Civil power; and can have no existence in this country, so long as the right to the writ of *Habeas Corpus* is in force. H. Blackstone's Rep. vol. 2, pp. 82–98—Maltby on Courts Martial, p. 3.

That Martial Law in this country is limited to the Rules and Articles for governing the Army, Navy, and Militia, when in actual service, and well known and established military usages. Maltby on C. M. pp. 1, 2, 3—Statutes of Maine and U. S. respecting Militia.

That Militia Law is not strictly Martial Law, but is to be found only in the Legislation of the States in relation to their Militia. That the powers and duties of Courts Martial are defined and limited by the different systems of laws they are called upon to execute, and that this Court will find its powers and duties only in our Militia law; and, therefore, cannot find the Respondents guilty of Mutiny, unless the Court find such an offence specified in our Militia laws.

The Counsel for the Respondents further contended, that the Militia is divided into Divisions, Brigades, Regiments, Battalions, Companies, &c. and that by immemorial usage, the Military and Militia Laws, and all the writers on Military Tactics, each Division, from that of a corporal's file to that of a Grand Division of an Army, has a Military Commandant, whose right and duty it is to exercise such command until arrested, suspended, or discharged by lawful authority; that in the case of the disability or absence of any such commandant, the next officer in command descending, but never ascending, has a right to such command. The inferior in command is bound to obey the lawful orders of his superior—but is not bound to obey the order of his superior (more especially in a time of peace) unless that order is justified by law or Military usage. The superior in command can, in no instance, personally take the command of his inferior, and if he does, he is guilty of a usurpation, and liable to be tried by a Court Martial. Maltby on the Elements of War—p. 1—Militia Law of Maine, sec. 16, ch. 164.

The Commandant of a Regiment has a right to con-

sider himself a Tactician, as by law he is bound to be; and has a right to manœuvre his Regiment in such manner as he may deem best, provided he is governed by the general principles of the System of Tactics in use, under the Orders of the Commander in Chief. Although the Major General might lawfully direct the Colonel of a Regiment to put his Regiment into a proper position for Inspection, yet the way and manner of doing this, is a matter peculiarly within the province of the Colonel, and in which the Major General could not, within military usage, or with propriety, interfere. In the case under consideration, it was for the Colonel, and not for the Major General, to determine whether it should be done by *backward*, or by *forward* wheeling.

These positions were applicable, as involving general principles, to the case of each Respondent. But their Counsel contended further, in behalf of the Captain,

1st. That the Major General, by usurping the personal command of the Regiment, had broken the military line of command, destroyed the military principle of regular subordination, thrown the Regiment into a state of anarchy, and put an end to all command.

2dly. That, as a subaltern, the Captain could not notice an order, but through his immediate superiors.

3dly. That he had been dismissed by his Colonel;—That while the Major General and Colonel were giving contradictory orders, it was impossible that the Captain should be held to decide which he should obey, on peril of being tried by a Court Martial.

In behalf of the Lieutenant and Ensign, their counsel contended—1st, That at the time each was successively ordered to bring the Company into line, the Company was dismissed.

2dly. That the arrest of the Captain, not being in writing, agreeably to the provisions of sec. 9 of Statute Feb'y 28, 1825, ch. 319, was a nullity; and, therefore,

the Captain was still Commandant of the Company; That, consequently, these Respondents had no command of the Company, and could not obey the order of the Major General.

Finally, that all the Respondents ought to be discharged from their arrest, and restored to their respective commands with honor.

The Division Advocate in reply contended, that this Court must be governed by the *same rules* of pleading, which were practised in the former General and Division Courts Martial, for which this Court had been, by Statute, substituted; because, by said Statute, this Court is constituted with the "*same powers*" as were those Courts. Militia Law of Maine, Feb'y 24, 1827, sec. 1. ch. 367.

The practice in this Court must of course follow the practice and precedents of pleading in the Court from which it has derived its similitude of powers. In the old Courts it was the practice to charge the Respondent for military offences, in *general terms*, specifying *time*, *place* and *the precise nature* of the offence. Macomb, p. 64. In the present cases, this rule had been strictly complied with. Courts Martial, being usually composed of gentlemen of ability, and discretion, but who are not to be supposed conversant in legal subtleties and technical distinctions, are not to be influenced in their decisions by *special pleading*, when all matters of fact can be given in evidence under the general issue, or some plea heretofore allowed in Courts Martial; and hence, all the benefits which could result from sustaining a *demurrer* in a Court of common law, the Respondents could avail themselves of in these cases, by the usual mode of pleading. Maltby on C. M. p. 53—Remarks of Tytler on the same subject.

If the Respondents wished to obtain a more specific allegation of the particular acts constituting the offences with which they are charged, they ought, in con-

formity with the practice in Military Courts, to have moved the Court for a more special detail on the part of the prosecutor. Vide authorities last cited.

In relation to the third and fourth charges, and the demurrer of the Respondent's Council thereto, the Division Advocate further contended, that the term "*Mutiny*" was a generic word, comprehending a great variety of acts, either of which might constitute the offence of Mutiny, but some of which acts were only criminal in time of war—others both in time of war and in time of peace. As an example of the former class might be named, contemptuous expressions against the President of the United States; and as an example of the latter kind, resisting, (as in these cases) the authority of a superior Officer. Macomb, p. 62.

The term Mutiny is merely technical in its legal acceptation. But in *common parlance* it is applied to an exclusive class of acts constituting the offence; and this Court, not being governed by technicalities of special pleading, are bound to receive it in its common acceptation. Therefore, although the word "Mutiny" is not used in the Rules and Articles governing the Militia when not in actual service, yet one of the offences therein expressed, viz. "combination to resist the lawful orders of any commissioned officer" (Militia Law, ch. 164, sec. 45, art. 1.) amounts *to the definition itself* of Mutiny, as used in common parlance. The charge, therefore, must be considered as well laid, and within the cognizance of this Court.

It was further contended on the part of government, that if the Court should be of opinion, that Mutiny is not an offence which can be committed by an officer of the Militia not in actual service, the Court are authorized, if the evidence be sufficient thereto, to find the Respondents guilty of a less crime than is charged, and pass thereon a special judgment. It does not follow, because

there is not *full* conviction, there must be an *entire* acquittal. Maltby, p. 72, was cited on this point—where a trial was had for *desertion*, but on examination the Respondent was convicted only of *absence without leave*, and sentenced, consequently, to a less severe punishment. If the evidence proves the Respondents guilty of a combination to resist the lawful authority of the Major General, they must be convicted of that offence, if not of mutiny; because the former partakes of the nature of the latter offence, although a less degree of criminality may be attached to it.

From the facts in these cases the question which naturally arises, being that of a *right to command*, the proper and almost only enquiry seems to be, whether the Major General had, or had not authority on the occasion under reference, to exercise command? If he had such authority, the Respondents are guilty (from the evidence) of at least a wilful disobedience of orders. But if he had no such authority, then the Respondents have properly pleaded, his want of authority to exercise command, in justification of their conduct.

Every officer is bound by the oath he takes, when qualified to act under his commission, to obey all orders and commands of his superior officers—the supposition being, that those orders will be both lawful and reasonable. Thus it becomes a part of an officer's duty, to yield obedience to the authority of superiors in command; and when he refuses that obedience, he is not only guilty of *disobedience* of orders, but also of a neglect of duty. Laws of Maine, ch. 164, Rules and Articles, &c. Sec. 50. This obedience of all subordinate officers is the result of sound policy in both the Law and the established usage, which have made it obligatory on military officers and necessary for the preservation of order and subordination among all troops, whether they be the soldiers in actual service, or the peaceful citizen soldiers of our Militia.

The evidence applicable to Captain Pattee's case, and those of his subaltern officers, is, that the Colonel of the Regiment had dismissed Captain Pattee's Company prior to the order of the Major General to him. Also, that Captain Pattee was only *verbally* arrested, when the law requires arrests to be made in writing.

If the Court should be of opinion, that the Colonel could exercise authority and dismiss his troops while under Inspection, and, as he himself discloses, while under the command of the Major General, the Respondent's defence is good. But it would seem that the Colonel's declaration could not affect Captain Pattee, however it might affect himself. Yet if the troops were under the command of a superior, and the Colonel was out of command, (however wrongfully it may have been taken from him) he could not lawfully exercise his lost authority, not even in the dismissing of his Regiment. Hence it would follow, if the Colonel had lost his command by a surrender to his superior, and refusal to command, that Capt. P. is guilty of disobedience of orders in not obeying the Lieutenant Colonel, and subsequently the order of the Major General.

But Captain Pattee's subalterns are for other reasons, perhaps, viz. for want of a legal arrest of the Captain, not guilty, in the opinion of the Court, of the charges preferred against them. It, however, would seem, that the want of a *legal* arrest of the Captain can only be taken advantage of by him. It does not affect the Lieutenant or Ensign, nor was that the reason why they did not obey the orders.

Opinion of the Court. The Court have duly considered the Causes of demurrer assigned by the Respondents, and are of opinion, that the offences alleged are not set forth with legal or usual certainty; and would, on motion, have ordered more definite specifications to be filed. The Court are also of opinion, that the offences technically de-

nominated Mutiny, and exciting to Mutiny, can only be committed in the Militia, *when in actual service*, and are not properly charged in these prosecutions. But it has not been found necessary to decide whether there may not be other offences partaking of the nature of these, but of minor importance, which might have been recognized under this form of charge.

The Court are of opinion, that the Respondents may, consistently with principles recognized by Military Courts, be held to answer over to the merits. And upon the evidence recited, have decided, that Captain Pattee might well avail himself of the order of his Colonel, dismissing his Company from any further service; and that no other officer could, subsequently, exercise any rightful command over him on that occasion. It is not necessary, *here*, to inquire into the character of the order, or to adjust the conflicting claims, of the Major General and Colonel. The order of dismissal came to Captain Pattee from his lawful and immediate Commander, and was a sufficient warrant for his conduct.

The same defence must avail the Lieutenant and Ensign.

But the defence of the subalterns is made good on another ground. The arrest of Captain Pattee not having been made in pursuance of the Statute, was void, and, consequently, the subalterns were only amenable to the orders of a superior through him; but might not exercise command over the company in his presence, and without his direction.

The Respondents were severally acquitted of all the offences charged against them.

Second Military Circuit....July 15th, 1829.

Present, WILLIAM KING, *President.*
EBENEZER HUTCHINSON, *Associate Member.*
GEORGE EVANS, *Division Advocate, 2d. Division.*

CASE. STATE *vs.* ELIPHALET ALLEN, *Captain 2d. Reg. 1st. Brig. 2d. Div. and others.*

1. A neglect to furnish written answers to Charges and Specifications, is not an admission of their truth, and does not preclude the Respondent from making a defence to the same.

This was a trial had at a session of the Circuit Court Martial for the Second Military Circuit, convened at Augusta, within the Second Division of the Militia of Maine, on the fifteenth day of July, 1829, for the trial of the Respondent and several others on various distinct Charges and Specifications preferred against them severally.

Most of the Respondents furnished the Division Advocate with written answers to the Charges and Specifications preferred against them respectively, fifteen days, or more, previous to the day of trial, agreeably to the Statute of Feby. 24, 1827, ch. 367, sec. 4.* The other Respondents had not furnished such answers.

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*The part of the section cited, reads as follows:—"And it shall be the duty of the Division Advocate, whenever any complaint is lodged with him against any officer, to reduce the Charges and Specifications of Charges to proper form and to transmit the same to the Adjutant General's Office, for the consideration of the Commander in Chief. And whenever a Court Martial is ordered, the Advocate shall be furnished with a copy of the order therefor, and of the Charges and Specifications exhibited, and cause the Respondent to be served with a copy thereof thirty days at least, before the time of trial. And the Respondent shall be held to answer said Charges and Specifications in writing, and deliver his answers to the Advocate fifteen days at least before the time of trial."

The Division Advocate moved the Court, that in relation to all those Respondents who had not furnished written answers agreeably to the requirements of the before named Statute, fifteen days before the day of trial, the Charges and Specifications should be taken as admitted.

Upon mature deliberation the Court decided, that the neglect to furnish written answers is not an admission of the truth of the Charges and Specifications, and that the Respondents are not thereby precluded from making a defence thereto.

First Military Circuit....August 11th, 1829.

Present, CHARLES S. DAVEIS, *President.*

JOHN TURNER, } *Associate*
BARNABAS PALMER, } *Members.*

FRANCIS O. J. SMITH, *Div. Adv. 5th. Div.*

CASE. STATE *vs.* WILLIAM MOSES, *Lieut. 2d. Reg. 2d. Brig. 5th. Div.*

1. The mode of arresting an officer not on duty, is subject to the control and construction of the Commander in Chief.
2. A Service of the Charges and Specifications preferred against an officer, by a copy of them left with him thirty days before the time of trial, constitutes an arrest under a General Order prescribing that mode.
3. The station of Companies in forming a Regiment depends on the rank of the Commanding Officers, and is not a right appertaining to companies independent of the Commanding Officer.

This was a trial had at a session of the Circuit Court Martial, for the First Military Circuit, commenced at Portland, within the Fifth Division of the Militia of Maine, on the eleventh day of August, A. D. 1829.

The Charges and Specifications instituted against the Respondent were in the terms following:—

"CHARGES preferred against William Moses, Lieutenant "of a Company in the second Regiment, second Brigade, "Fifth Division of the Militia of Maine, by Francis O. J. "Smith, Division Advocate of said Division, upon the "representation of Hugh D. McLellan, Colonel of said "Regiment.

"CHARGE 1.—Neglect of Duty, and Unmilitary Con- "duct.

"*Specification:* That the said William Moses, Lieute- "nant as aforesaid, on the first day of October eighteen

"hundred and twenty-eight, at Gorham, within the Divi-
"sion aforesaid,—the said Regiment being then paraded
"for review, under the command of William B. Harding,
"Colonel of the same, and the said Moses, being present,
"and in the command of his said Company, the Captain
"thereof being absent; and the said Moses being so in
"command, and stationed with his said Company and
"paraded with said Regiment for the purposes aforesaid,
"without the order or consent of said Colonel, or either
"of his superior officers, ordered and directed his said
"Company, they being under his command as aforesaid,
"to march from the rank and station in which they had
"been placed and then were by order of said Colonel,
"and withdrew himself and his said Company from the
"line of the Regiment aforesaid, and from the limits of
"the parade of the same, and wholly refused to remain
"with said Regiment, and to perform his duty therein, or
"to permit his said Company to remain and perform their
"duty with said Regiment."

"CHARGE 2.—Disobedience of Orders.

"*Specification:* That the said William Moses, Lieuten-
"ant as aforesaid, at Gorham aforesaid, on the day last
"mentioned, the said Regiment being then and there pa-
"raded for Review, under the command of William B.
"Harding, Colonel thereof—and the said Moses being also
"present, and, in the absence of the Captain of said Com-
"pany, the said Moses being in command thereof, within
"the limits of the parade of said Regiment, and being
"ordered and required by the said Colonel to march his
"said Company—the Company under the command of the
"said Moses as aforesaid, into the line of said Regiment,
"and into the rank and station which had been pointed
"out and assigned to them, wilfully, insultingly, and con-
"temptuously refused so to do, and to obey the order of
"the Colonel aforesaid, and to march his said Company
"as ordered and required, or to permit them to be placed

"under the command of said Colonel, but in defiance of "said order and of the authority of said Colonel, and "contrary to military law and usage, withdrew his said "Company from the limits of the parade aforesaid."

"Respectfully submitted to the consideration of the "Commander in Chief.

"FRANCIS O. J. SMITH,
"*Div. Adv. 5th Div.*"

"Portland, June 16, 1829."

The General Order, convening the Court for the trial of the Respondent, concluded as follows:—

"Lieutenant William Moses will consider himself as "under arrest, as soon as he shall be furnished with a copy "of this order, and the Charges and Specifications pre- "ferred against him.

"By the Commander in Chief.

"SAMUEL CONY, *Adjutant General.*"

The answer filed by the Respondent, with the Division Advocate, agreeably to the Statute of Feby. 24, 1827, ch. 367, sec. 4, was in the following words:—

"And now William Moses, Lieutenant of a Company "of Infantry in the Second Regiment, Second Brigade, "and Fifth Division of the Militia of the State of Maine, "who has been served with a Copy of a General Order, "convening the Circuit Court Martial for the First Mili- "tary Circuit, for the trial of himself on certain Charges "and Specifications of Charges, as in said Order set forth, "for answer says,—

"That said Court has not, under any proceedings by "virtue of said Order, jurisdiction, and ought not to take "cognizance, of any Charges preferred against this Re- "spondent; because he claims, that he has never been "legally arrested, and is not bound by law to answer said "Charges and Specifications of Charges, before he has "been legally arrested; and so much of his answer he

"prays may be received in the nature of a plea to the "jurisdiction of this Honorable Court.

"And further protesting, that he is not by Law under "present proceedings bound to answer to said Charges, "he replies thereto, that he is not guilty of any Neglect "of Duty, and Unmilitary Conduct, as set forth in the first "Charge—And he says, that he did not march said Com- "pany from the rank and station in which they were pla- "ced, and then were, by the said Colonel—without an "Order therefor, but in obedience to the Order of the "Colonel, while he, the Respondent, thought that said "Company had their proper rank in the Line.

"But he admits, that said Company did march from the "limits of the Parade, for the reason that the Colonel "illegally ordered said Company to be marched from their "station in the Line,—and to assume a different and de- "grading station. And the said Respondent denies, that "he heard or understood the Order as stated in the sec- "ond Specification; but had he so done, he contends, "that the Order was illegal, and such an one as he was "not bound to obey.—And further, that the Order was one "which he could not obey, as the men belonging to said "Company absolutely refused to march to any other sta- "tion in the Line, under the command of the Respond- "ent, or any one else; which the said Colonel well knew."

"WILLIAM MOSES."

It was in evidence that the Respondent had been served in hand, by the Adjutant of the Regiment to which the Respondent belonged, with a copy of the General Order of the Commander in Chief, convening the Court, and also with a copy of the Charges and Specifications preferred against the Respondent, thirty days before the time of trial, agreeably to the Statute of Feby. 24, 1827, ch. 367, sec. 4. There was no evidence as to any other form of arrest.

Samuel Fessenden, Esq. Counsel for the Respondent,

contended in support of the exception taken in the Respondent's answer to the jurisdiction of the Court for want of a sufficient arrest, that there should have been an actual arrest of the officer to be tried, as a pre-requisite, thirty days before the time of trial. On this point he cited the laws of Maine, ch. 164, sec. 45, as follows :—

"Art. 3. Every officer, to be tried by a Court Martial, "shall be put in arrest, so as to be suspended from the "exercise of his office, and shall have a copy of the "Charges exhibited against him, and notice of the time "and place appointed for his trial ; which copy and notice "shall be given thirty days at least before his trial is com- "menced."

Sect. 9, ch. 319 of the Laws of Maine, further requires an actual arrest to be ordered by the Commander in Chief, or Major General ; and declares an arrest without this, to be illegal.

The Respondent's Counsel also cited Maltby on Courts Martial, p. 128, where the form of a warrant of arrest is given, and the proper return of the Adjutant's doings prescribed to be made to the Commanding officer. Such a course of proceeding in making an arrest, it was contended, is indispensably necessary, in order that the Respondent's superior in command may be apprised of the subordinate's disability to exercise command until after the trial. A sufficient arrest disqualifies him for doing military duty. Laws of Maine, ch. 164, sec. 45, art. 5. And after an arrest has been made, superior officers cannot issue Orders requiring obedience. But if they are not apprised of the arrest, as they are not presumed to be when made as in the case before the Court, they may issue Orders which will not, and cannot rightfully, be obeyed, and their proceedings will conflict with the proceedings of this Court. The consequence of such a state of things, resulting from a construction of Military Law that will sustain this mode of arrest, may be, under some

circumstances, of the most serious character. The Counsel for the Respondent also cited precedents requiring a positive arrest of the officer charged;—and contended that if any different usage prevailed, it was to be corrected and controlled by principle.

The Division Advocate contended in reply,—

1st. That the Respondent could not avail himself of an objection to the method of his arrest, under the answer which he had put in the case, nor under the plea to the jurisdiction of the Court embodied in his answer. The answer is not sufficiently explicit and specific to secure him the privilege of such an objection, even if the objection could be taken advantage of in any shape, or at any time: And because the objection as now urged in argument, does not appear in the answer filed. The Government or prosecuting officer has not been seasonably, and in proper form, notified of the nature of the defect in the arrest, alluded to in the answer. The answer alleges in only general terms, the want of a legal arrest. It should have alleged not only the existence of a defect, or insufficiency of arrest, but also the specific nature of that defect, or insufficiency, if the Respondent would take any benefit from the exception. It is not for government to anticipate the Respondent's defence—but the Respondent is bound to particularize the nature of it in his answer, especially if it goes to something else than the merits of the charges. From the general allegation in the answer of the Respondent, that his arrest has not been sufficient, the Court could not, nor could the government, understand on what ground the defence would be set up. It could not be foreseen, whether the defence would be, that the service of the papers had not been seasonably made on the Respondent, that is, thirty days before the time of trial; or, that the service was by reading, instead of by copies, as the law directs; or, that it was by an improper person, or officer; or, as is

now argued by the Respondent's counsel, that it was without a General Order therefor, passed down from the Commander in Chief through the officers of the Division and Regiment, superior in grade to the Respondent, and without an actual arrest. It is not competent for the Respondent to avail himself of either of these various grounds of defence, as he may choose at the time of trial, under a general answer like the one filed; nor, by particularizing either of them, at the moment of trial, even if they would be good when properly and seasonably taken.

2dly. If the exception taken to the jurisdiction of the Court is admissible under the general answer filed by the Respondent, it cannot be sustained; because the arrest proved is all the law requires or prescribes to be made. The Commander in Chief, in the General Order served on the Respondent, ordered the Respondent to consider himself as under arrest, as soon as he should be served with a copy of that Order, and of the Charges and Specifications preferred against him. This, the Division Advocate contended, was tantamount to, and in effect, *an order* for the arrest of the Respondent, within the meaning and requirement of the law ch. 319, sec. 9, cited by the Respondent. Sec. 4, ch. 367 of the Laws of Maine, provides, that the Respondent shall be served with the copies mentioned in the General Order of the Commander in Chief, thirty days before the time of trial. This is tantamount to, and in effect, *an arrest* under the existing law. It is all the arrest which the law contemplates, under the present system of Courts Martial, and to such an arrest the section of the law, last cited, requires the Respondent to answer. He is therefore bound to answer, and his exception is against this requirement of the law. This section is a substitute for the provisions of sec. 45, art. 3, ch. 164, cited by the Respondent's Counsel. If the operation of this mode of arrest is ob-

jectionable in practice, the Legislature, and not this Court, has the power to remedy it.

The opinion of the Court was given on this point as follows:—

Military usage has established, that an officer to be tried by a Court Martial shall be placed in arrest; by which he is in effect suspended from the exercise of his office. The 45th section of the Act of 1821, ch. 164, for governing the Militia, when not in actual service, cited for the Respondent, is not in terms repealed by the Act of February 24th, 1829, establishing the present system of Circuit Courts Martial. The 3d article of it, as quoted, provides that an officer to be tried, shall be put in arrest, so as to be suspended from the exercise of his office. The 5th article further provides, that if any officer after having been in arrest, shall presume to exercise any Military command until he is discharged from his arrest, he shall be liable to be tried by a Court Martial, and, if convicted, to be removed from office: and article 10th provides, that no officer shall consider himself as exempt from the duties of his station, except when under arrest, until he shall have been discharged, &c.

Whether the penalty of the 5th article, or the exemption in the 10th, be applicable except to cases where there is an actual arrest, might present another question in a proper case assuming the form of a distinct allegation for an offence charged, as coming within the meaning of the prohibition, or as not coming within the effect of the protection.

The present case is not one of an officer undertaking to exercise a command, or charged with a neglect of duty, subsequent to the service of a copy of the charges whereby he is required to consider himself under arrest.

The point presented in this case relates to the regular course of judicial proceeding. It is a preliminary appointed to be observed by the law governing and direct-

ing the Militia when not in actual service; and it is commonly the case, that the officer, against whom charges are preferred, is not on actual duty; not carrying a sword, but in the ordinary garb and usual occupation of a citizen. It may be quite proper, that in all cases when a subaltern is to be tried, whereby he is in effect suspended, his principal superior officer should be officially apprised; and when an arrest is made upon the field, or while the officer, who is to be charged, is on duty, it may also be proper that it should be performed in a particular manner. But whether the precise form prescribed in actual service has been observed according to the strict usage of Military etiquette, cannot apparently be important in regard to the due exercise of authority belonging to the present constitution of Courts Martial.

The Act constituting the Court provides that whenever a Court Martial is ordered, the officer to be tried shall be served with a copy of the Charges and Specifications thirty days before the time of trial, by the Division Advocate; and shall be held to answer said Charges and Specifications in writing, and deliver his answers to the Advocate fifteen days before the time of trial. The object of the provision is notice. If any thing further than this is required, it is made no part of the duty of the Division Advocate. If it is requisite, that the officer should be placed in arrest, the manner of it for this purpose is not so material but that it may be under the control and construction of the Commander in Chief. By the general order convening the present Court Martial, Lieutenant Moses is required to consider himself under arrest, as soon as he shall be served with a copy of the order, and the Charges and Specifications preferred against him. He was served with such copy in season, by the Adjutant of the Regiment. It is not seen why this may not be sufficient for the present purpose, as well as if it appeared that the ceremony of demanding and receiving the Re-

spondent's sword had been literally performed. That is only a figurative circumstance. The mere form cannot be essential in this respect.—The objection was, therefore, overruled.

This preliminary exception being thus disposed of, the trial proceeded on the merits of the charges.

The facts which appeared in evidence were substantially as follows:—

The Regiment commanded by Col. Hugh D. McLellan, was ordered to appear for Review, Inspection, and Discipline, at Gorham, on the 1st of October, 1828. The Respondent was Lieutenant of a Company commanded by Capt. Joseph Waterhouse, the date of whose commission properly entitled him, in case he had been present, to a certain rank, viz. the command of the Second Grand Division. Capt. Waterhouse, however, was not present; and the Company being under the actual command of Lieutenant Moses, claimed the position which would have been assigned to the command of Capt. Waterhouse, had he been present.

The line of the Regiment was first formed in the street by the Adjutant; and it was then represented to him, that Captain Waterhouse was expected. The Adjutant then informed Lieutenant Moses that he should take the place belonging to the Captain for the present; but that if the Captain did not appear when the Regiment should be formed, he must then, with the company, take the station belonging to him as Lieutenant. The Company was accordingly posted according to the rank of Capt. Waterhouse, on the right of the Second Grand Division; and so marched into the field. Capt. Waterhouse did not appear, and several Captains making complaint that they were ranked by a Lieutenant, the Colonel ordered the Regiment to be re-formed, and Lieutenant Moses was directed to march his Company to the place which should be assigned him. Lieutenant Moses remonstrated against

the order, on behalf of the Company, but expressed a willingness to take any position to which he should be ordered personally. On the order being given by the Colonel, the Company wheeled out into the rear, and marched along the line,—Lieut. Moses marching at the head of the Company. The Lieut. Colonel inquired of Lieut. Moses where he was marching, and ordered him to halt; but he continued his march until the Company was beyond the guard, and out of the limits of the parade. They were then halted by the Respondent, drilled, and afterwards dismissed. Previous to this, the Colonel had ordered Lieut. Moses to march his Company back to the line; but he declined to obey the order, saying the Company were not under his command,—and the Company was not inspected.

The points of defence, presented in the answer, were insisted upon by the Counsel for the Respondent, and were opposed by the Division Advocate in reply.

Opinion of the Court. The station of Companies in forming a Regiment depends on the rank of the respective Commanding Officers; and it is not a right appertaining to the Company independent of the Commanding Officer, or in virtue of the commission of the Captain, if he be not present. This is said to be a question of frequent occurrence; but it is determined by the Act of March 21, 1821, sec. 45, art. 20, (ch. 164.) Consequently, it was the duty of the Respondent to assume the station to which he should be assigned with the Company under his command, in the absence of the Captain, according to his rank as Lieutenant.

On this part of the case there is a defect of proof, that there was any positive station "pointed out and assigned;" as set forth under the *second* Charge and Specification for Disobedience of Orders; so that the Respondent is not to be adjudged guilty of that Charge and Specification. In pronouncing this opinion, nevertheless, upon the exact form of the allegation, the Respondent is not to

be considered as exculpated from that portion of it which accuses him of treating the authority of the Colonel with defiance, and withdrawing his Company from the limits of the parade, contrary to military law and usage. This, however, is not to be regarded as the material allegation under this head, but introduced into the article as aggravation; and of this Charge and Specification the Respondent is therefore adjudged Not Guilty.

Neither is the evidence sufficient to establish so much of the allegation under the *first* Charge and Specification, as sets out that the Respondent "ordered and directed his "said Company, they being under his command as afore- "said, to march from the rank and station in which they "had been placed, and then were by order of said Colo- "nel." But striking out that clause, together with the copulative which connects it with what follows, there is still a substantial offence set forth therein, sufficient to found a legal judgment thereon; and upon the residue of said Specification the Court adjudge the Respondent guilty of the Charge of Neglect of Duty and Unmilitary Conduct.

The reason offered as an excuse, that the Company refused to comply with the order from the Colonel, and was not in a perfect state of subordination, supposing such to be their temper, must be unavailing; as it does not appear that there was any effort on the part of the Respondent to give effect to the command; but he appears to have made one with them in act and opinion. The mistaken impression under which the respondent may have conducted, however honestly, in respect to the right of the Company, cannot be esteemed as a palliation, or entitled to indulgence, although it may have some influence in the sentence.

The Respondent was therefore sentenced by the Court to be removed from office, and to be disqualified and incapable of holding any military office under this State for the term of one year.

First Military Circuit....June 2d, 1830.

Present, JOHN TURNER, *Acting President.*
BARNABAS PALMER, *Associate Member.*
JOHN FAIRFIELD, *Division Advocate, 1st. Div.*

CASE. STATE *vs.* JOSHUA SMALL, *Captain 4th. Reg. 2d. Brig. 1st. Div.*

1. A written order need not contain the name of the person to whom it is addressed, if the order be handed to him by the proper Officer in command.

2. Language capable of being readily understood, is sufficient to constitute an order, without strict regard to form.

3. The power to detach an officer to fill an office temporarily vacated, is incident to the duties of Commanding Officers, whether of Regiments, Brigades or Divisions.

4. A Respondent is precluded from setting up by way of defence against charges, the defects of a Regimental order, which he had appeared with his Company, at the time and place required by the order, to obey.

This was a trial had at a session of the Circuit Court Martial, for the First Military Circuit, convened at Limerick, within the First Division of the Militia of Maine, on the second day of June, 1830.

The Charges preferred against the Respondent, and the Specifications thereof, were as follows:—

"CHARGE 1st.—That the said Joshua Small, at Liming-"ton, within the bounds of said Regiment, on the 15th "day of October, 1829, was guilty of *Disobedience of "Orders.*"

"*Specification.*—For that the said Regiment, at said "time and place, being called out by the Commanding "Officer thereof for Military duty, Inspection and Review, "and the said Joshua Small being then and there in the "command of a Company belonging to said Regiment as

"aforesaid, and being then and there ordered by the "Commanding Officer of said Regiment to march with "said Company on the ground of parade, to form in the "line with said Regiment, then and there neglected and "refused to obey said order."

"CHARGE 2d.—That the said Joshua Small, on said "day, and at said place, was guilty of unmilitary con- "duct."

"*Specification 1st.*—For that the said Regiment, being "called out as aforesaid, at the time and place and for the "purposes aforesaid, and the said Joshua Small being "then and there in the command of a Company as afore- "said, then and there dismissed said Company without "the order or consent of the Commanding Officer of said "Regiment."

"*Specification 2d.*—For that the said Regiment, being "called out as aforesaid, at the time and place, and for "the purposes aforesaid, and being about to form a line "on the ground of parade, the said Joshua Small being "then in the command of a Company belonging to said "Regiment as aforesaid, neglected to march his said "Company to the ground of parade, and to form in line "as aforesaid."

The Respondent's Counsel, *Joseph Howard, Esq.* objected in defence, that the Respondent had not been properly notified to call out his Company for Inspection and Review, both as to the matter contained in the written order which was produced, and as to the person by whom it was served on the Respondent.

1st. Because the name of the Respondent did not appear in said order.

2dly. Because the language used amounted to nothing more than the announcement of a fact, and not to a peremptory order.

3dly. Because, the order was served by Arthur McArthur, Esq. who, it appeared, had been appointed Ad-

jutant *pro tempore* in the absence of the regular incumbent, when the Colonel, as it was contended by the Respondent's Counsel, had no authority to make any such appointment.

The order produced, was as follows:—

"MILITIA OF MAINE.

Regimental Order. { Fourth Regiment, Second Brigade, First Division—Head Quarters, Limington, Sept. 24, 1829.

The Fourth Regiment will meet at Limington village, on Thursday the 15th October next, at six o'clock, A. M. for Military duty, Inspection and Review.

By order of the Commanding Officer.

A. McARTHUR, Adjt. *pro tem.*"

It appeared in testimony, that the foregoing order was handed in due season, by said McArthur, to said Small, the Respondent, personally.

In answer to the objections taken by the Respondent's Counsel, it was contended by the Division Advocate,

1st. That where the order was handed to the officer personally, by the proper officer, it was no more necessary that it should contain the name of the officer addressed, than it would be necessary in an order given on parade verbally. That it was only necessary he should be addressed by name, when the order was transmitted through a channel other than the ordinary one.

2dly. That no particular form, or precise set of words was necessary to be used in the giving of an order; but that if such language was used as plainly communicated the object and intention of the officer issuing such order—and it was reasonable to believe, that it was understood* by the officer to whom it was addressed, such officer could not be justified in refusing obedience thereto.

3dly. The power of detaching another officer to per-

*Vide case of State *vs.* Daniel S. Hill, reported in this volume.—*Ed.*

form the duties of an office, temporarily vacated by sickness, or absence, or otherwise, of the regular incumbent, is necessarily incident to the duties of Commanding Officers, whether of Regiments, Brigades, or Divisions. The denying such power to a Commanding Officer, would, under any circumstances, be productive of serious inconvenience; and where troops are called into actual service, the denial of such power might prove most disastrous in its consequences.

4thly. The Respondent is precluded from setting up by way of defence to these charges, any defects in the order, inasmuch as he appeared at the time and place, with his Company, as required by said order.

The Court sustained these several positions, taken by the Division Advocate, and adjudged the order sufficient both as to the matter therein contained, and the mode of service, and adjudged the Respondent guilty of the offences charged.

The Respondent was therefore sentenced by the Court to be removed from office, and to be disqualified and incapable of holding any military office under this State for the term of twelve years.

First Military Circuit....June 8, 1830.

Present, JOHN TURNER, *Acting President.*
BARNABAS PALMER, *Associate Member.*
FRANCIS O. J. SMITH, *Div. Adv. 5th. Div.*

CASE. STATE *vs.* JOHN AKERS, *Lieutenant of Cavalry, 2d. Brig. 5th Div.*

1. Officers and Privates of a Company called out to elect Officers to fill vacancies, are not bound to perform any duties on such occasions, beyond what are requisite to effectuate the elections.

This was a trial had at a session of the Circuit Court Martial, for the First Military Circuit, convened at Portland, within the Fifth Division of the Militia of Maine, on the eighth day of June, 1830.

The Charges preferred against the Respondent, and the Specifications thereof, were as follows:

"CHARGE 1. Ungentlemanly and Unofficerlike con-"duct.

"*Specification:* In this—the Company of Cavalry afore-"said, in the Second Brigade of the Division aforesaid, of "which the said Akers was Cornet, met at the usual place "of parade, in Westbrook, within the limits of said Com-"pany, on the twenty-sixth day of September last past, "for the purpose of choosing Officers to supply vacancies "then existing in said Company, agreeably to previous "notice and warning regularly given. And the said "Akers was then and there present in his said capacity "of Cornet, and was duly chosen Lieutenant of said Com-"pany, that office being then vacant; but before said "Company was dismissed, said Akers, heedless of his duty "as an officer, and of the respect due the other officers "and members of said Company, became, and made him-

"self, by means of spirituous liquors, so intoxicated as to "be incapable of performing his duty, and conducted "otherwise in a disorderly, ungentlemanly, and unofficer-"like manner.

"CHARGE 2d.—Neglect of Duty.

"*Specification:* In this—On the fifth day of October "last past, the aforesaid Company, having been duly no-"tified and warned thereto, met in said Westbrook, within "the limits of said Company and at the usual place of "parade, for Inspection and Review, the said Akers being "then Lieutenant in said Company; yet the said Akers, "though duly notified of said meeting, and warned to "appear as aforesaid, absented himself therefrom, and "neglected and refused to meet with said Company on said "day, and at said place, and neglected and refused to "perform the duty then and there devolving upon him, "and has ever since neglected and refused to make any "reasonable excuse for his said neglect of duty."

To these Charges and Specifications the Respondent pleaded, *Not Guilty.*

The evidence was, that after the election had been completed on the 26th day of September, of all the officers required, the Lieutenant of the Company, who was in command thereof as senior officer, proceeded to discipline and drill the Company, mounted on horse;—that no one of the Company objected thereto;—that it had been customary for the Company to drill, after having completed elections required. The Respondent did not ride nor drill with the rest of the Company, though he had not been dismissed from further duty by the Commanding Officer. He was, however, upon the field, near the Company and in sight of them, and was evidently and positively intoxicated, so as to render him unqualified to perform duty. It did not appear that he was intoxicated before the elections were completed, but that on the contrary, he participated in the duties of making the elections, without affording any cause of complaint.

It was further in evidence, that the Commanding Officer of the Company for the time being, verbally warned and notified the Company to meet at the usual place of parade on the fifth day of October, then next ensuing;—that the Respondent was present, or near by, and within hearing at the trial, and knew of the order; but neglected to appear at the meeting thus warned.

The Respondent's Counsel, *J. D. Kinsman*, Esq. contended upon this evidence, in relation to the first Charge and Specification, that the Respondent was not amenable to this Court, nor liable to punishment for his conduct while not in the performance of a duty required by law; that if he was intoxicated at all, as charged, he was not proved to have been so until after the purposes and duty for which he had been ordered out, had been completed and performed;—that he was called out to an election of officers only, and was not bound to do other duty, even though he had been commanded thereto; that the Commanding Officer of said Company, in retaining and not dismissing the Company after the elections had been completed, transcended his powers, and his subordinates were no longer amenable to his commands, nor to Military law, for their conduct.

In relation to the second Charge, it was contended by the Respondent's Counsel, that legal and sufficient notice of the meeting of the Company on the fifth of October, was not given the Respondent;—that at the time of the warning of the Company by the Lieutenant in command, the Respondent was not on duty, and was not bound legally to take notice of the warning.

The Division Advocate in reply contended, that as the Company had not been dismissed, and as the Respondent had neither been dismissed, nor requested to be so, and as all the members of the Company tacitly acknowledged themselves to be still under the command of the senior officer, they were bound to obey him, although other duties

than the choice of officers were commanded;—that so long as they were thus voluntarily, if not rightfully, under the command of the senior officer, so long they were amenable to Military law for their conduct; that such was the condition of the Respondent. He was legally under the command of the senior officer, at the time the elections were completed;—he had not been dismissed—he had not asked to be dismissed—made no objection to the performance of further duty, and although he was not in the ranks, mounted—for the reason that he was too obviously intoxicated to be there, he nevertheless was in the presence, and still voluntarily, if not otherwise, subject to the commands, of the superior Officer, and was therefore amenable to Military law for his conduct. The proof abundantly sustains the Charge.

As to the Second Charge, the proof is, that the Respondent was warned and notified, with the other members of the Company present, to meet on the day alleged in the Specification. The law is not specific as to the warning that shall be given to officers—it certainly does not intend any more for them, than for privates—much less notice of Company meetings, has ever been considered sufficient for officers, than is required for privates. An officer should not object to the sufficiency of a notice, to which privates make no objection. Whether the Respondent was rightfully or wrongfully—legally or illegally on parade, when the Company was warned to meet on the fifth of October, cannot alter the fact that he was there, and knew of the order for this meeting—And if the law does not prescribe a different mode of warning subordinate officers to Company meetings—if a law does not exist, as it does not, that entitles the Respondent to a more special or formal notice of what was required of him, then is the Second Charge fully sustained.

The Court decided, that the Commanding Officer of a Company, which has been called out exclusively for an

election of officers, has no authority to require other duties of the Company, beyond what is requisite in effectuating the elections proposed—the members of Companies not being holden by law to perform any duties, except to elect officers, on more than three days in a year. Laws of Maine, ch. 319, sec. 2, Feby. 28, 1825. However, a Company authorised to enact it, may by a rule or by-law of the Company make it otherwise. Laws of Maine, ch. 319, sec. 2. In the case of the Respondent, the proof is, that the Company was ordered out particularly to elect officers. Although it has been fully proved, that he is guilty of having been intoxicated on the occasion, it is not in proof that he was so until *after* the election of officers had been effected; and, therefore, not until after he was released by law, though not by the Commanding Officer, from the performance of further duty. For these reasons, the Court rule, that the Respondent is not guilty of the First Charge and Specification.

Under the Second Charge and Specification it has been proved, in the opinion of the Court, that the Respondent was duly and sufficiently* warned to meet, as alleged;—that it was his duty to meet accordingly;—that he neglected to do so;—that he had declared he never would do duty under the then Commanding Officer of the Company. The Court, therefore, adjudged the Respondent GUILTY of the *Second Charge* and *Specification*, and sentenced him to be removed from office, and disqualified from holding any military office under this State for the term of two years.

*See Case, State *vs.* Silas Leighton, Jr. reported in this volume. *Ed.*

First Military Circuit....June 22d, 1830.

Present, JOHN TURNER, *Acting President.*
BARNABAS PALMER, *Associate Member.*
WILLIAM K. PORTER, *Division Advocate 6th Div.*

CASE. STATE *vs.* CHARLES WADSWORTH, *Lt. Colonel, 2d. Reg. 2d. Brig. 6th Div.*

1. Drunkenness in an Officer on Parade, is an offence within the cognizance of Courts Martial.

This was a trial had at a Session of the Circuit Court Martial, for the First Military Circuit, convened at Fryeburg, within the Sixth Division of the Militia of Maine, on the twenty second day of June, 1830.

The Charge and Specification preferred against the Respondent were as follows:—

"CHARGE.—Unmilitary Conduct.

"*Specification:* For that the said Lieutenant Colonel "Wadsworth, on the twenty second day of September now "last past, [1829,] being the day of the annual review of "the said Second Regiment, and while the said Wadsworth "was on parade with the said Second Regiment, did, by "the free and copious use of ardent spirits, get intoxica-"ted, which led to much confusion and disorder in his "command, and which conduct tends to degrade the "character of the soldier."

The Respondent pleaded *Not Guilty.*

The Respondent's Counsel, *Stephen Chase*, Esq. contended, that admitting the facts charged, it did not constitute unmilitary conduct in the Respondent so as to render him amenable to this tribunal. On this point were cited the Acts of Congress, allowing rations of liquor to the Army and Navy; and also the regulations for the same allowance by the laws of this State.

The Division Advocate contended, that the offence charged was clearly unmilitary conduct, and within the jurisdiction of the Court.

The Court over-ruled the positions taken in defence, and adjudged the Respondent guilty—and sentenced him to be removed from office, and disqualified from holding any military office under this State for the term of one year.*

*There was evidence that the Respondent "had in a great measure reformed as to his habits of intemperance," which the Court received in mitigation of the sentence. *Ed.*

First Military Circuit....August 17, 1830.

Present, JOHN TURNER, *Acting President.*
BARNABAS PALMER, *Associate Member.*
FRANCIS O. J. SMITH, *Div. Adv. 5th Div.*

CASE. STATE *vs.* SILAS LEIGHTON, JR. *Lieutenant, Lt. In. 1st. Reg. 2d. Brig. 5th. Div.*

1. Notice of Company meetings by Commanding Officers, to Subaltern Officers, need not be in writing, nor transmitted by a third person.

This was a trial had at a Session of the Circuit Court Martial, for the First Military Circuit, convened at Portland, within the Fifth Division, on the seventeenth day of August, A. D. 1830.

The Charge preferred against the Respondent, was for Disobedience of Orders and Neglect of Duty. To this Charge, three Specifications were appended, detailing the Respondent's Disobedience of Orders and Neglect of Duty, in not appearing with the Company of which he was Lieutenant, on three several occasions, agreeably to orders, or notices given him, *verbally*, by the commanding officer of the Company.

To this Charge and the several Specifications the Respondent pleaded *Not Guilty*, and by a second plea, "that he never was legally ordered, notified, and required according to law, to meet with the said Company, at either of the times mentioned in said Specifications, for the purposes therein set forth, either by an order duly and legally issued by the Commanding Officer of said Company, and legally served on him, or by an order and notification published and promulgated on parade of said Company, by said Commanding Officer."

By the proof adduced on the part of Government, it appeared that the Respondent was notified of each meet-

ing of the Company, and requested to meet with it, by the Commanding Officer of the Company, ***verbally;*** and four days before each meeting specified.

It also appeared in evidence, that it had been the usage of the Commanding Officers of said Company, ever since its organization, to notify their Subaltern Officers only ***verbally.*** And when the command of the Company once devolved on the Respondent, he being Lieutenant, and Commanding Officer *ex officio*, the office of Captain being vacant, he, too, notified his Subaltern ***verbally***, and not in writing. It was in proof, however, that in some Companies the usage had been for the Commandant to give ***written*** notices to their Subaltern Officers. In other Companies, the usage was proved to have been the same as in the Respondent's Company.

The Respondent's Counsel, *J. L. Megquier, Esq.* contended, that ***verbal*** notice of Company meetings, given by the Captain to a Subaltern Officer, is not sufficient in law, and not binding on the Subaltern. The Captain can only notify his Subaltern Officers in the way privates are notified—to wit, by transmitting his order, or notice, through and by a non-commissioned officer, or private, delegated therefor by the Captain.

It was contended by the Division Advocate in reply, that the statute law was altogether silent as to the particular mode in which Subaltern Officers of Companies shall be notified to meet with their Companies; that it was designedly silent on this point; the design was to leave such notices to be governed by military usages and principles, and the local situation of officers in regard to each other. Laws of Maine, ch. 164, sec. 50, March 21, 1821.

The Division Advocate further contended, that to construe the law after the manner of the Respondent's Counsel, that is, so as to empower Subaltern ***non-commissioned*** Officers, or privates, to notify ***commissioned*** officers,

would be to reverse all military grades, and to subject superiors in office to obey the commands of inferiors, or those not commissioned to office.

The Court decided, that the law does not make it the duty of the Commanding Officer of a Company, to notify his Subaltern Officers *in writing*, of the Company meetings, nor to transmit his notifications to them through a third person. It is competent for him to notify them *verbally*, and without the intervention of any other person. The Court consider that the law makes a distinction between the notices that shall be given to privates, and those to be given to Subaltern Commissioned Officers. The mode of the former is particularly defined and prescribed by law. But the mode of the latter is left wholly undefined, and therefore subject to military usages, and to be regulated by military principles. It is considered by the Court, that the notices proved to have been given to the Respondent, by his Commanding Officer, though only verbal, were sufficient in law, and binding on the Respondent, and ought to have been obeyed.

Considering, however, that the Respondent mistook his rights and liabilities, and the character of the notices given him, the Court adjudged him guilty, and sentenced him to be reprimanded in orders, by a reading of the Charges, Specifications and proceedings of the Court against him, at the head of the Regiment and Company to which he belongs.

First Military Circuit....November 1830.

Present, CHARLES S. DAVEIS, *President.*
JOHN TURNER, BARNABAS PALMER, } *Associate Members.*
FRANCIS O. J. SMITH, *Div. Adv. 5th. Div.*

CASE. STATE *vs.* EBENEZER SMALL, *Capt. 1st. Reg. 2d. Brig. 5th Div.*

1. It is the duty of the Commanding Officer of a Company to cause his Company to be paraded for Inspection and Drill, according to the regulation of law, without the order of any superior Officer.
2. The Captain of a Company cannot devolve this duty upon a Subaltern, so as to discharge himself.
3. The Captain of a Company cannot exempt himself from this obligation, by voluntarily absenting himself from the limits of his command on the eve of the time appointed by law for the parade of the Company for the above purpose.
4. It seems, however, that the Captain may acquit himself of this obligation by issuing his order in season to some one or more of the non-commissioned Officers or privates of his Company, to notify the men belonging to it to appear at the time and place appointed.

This was a trial had at a session of the Circuit Court Martial for the First Military Circuit, convened at Portland, within the Fifth Division, on the sixteenth day of November, A. D. 1830.

The Charge and Specification preferred against the Respondent were as follows:—

"CHARGE—Neglect of Duty.

"*Specification.*—That the said Ebenezer Small, on the "first day of September current, and a long time before, "was, and ever since has been Captain of a Company of "Infantry belonging to the First Regiment in the Second "Brigade and Fifth Division of the Militia of Maine; and "being so a Captain and Commanding Officer of said "Company, was in duty bound, and required by law to

"parade his Company on the Tuesday following the sec-
"ond Monday of September instant, at one of the clock
"in the afternoon, for Inspection and Drill; and to have
"caused his said Company and the members thereof to be
"notified and warned to parade as aforesaid, for the pur-
"pose aforesaid. Yet the said Small, regardless of his
"duty, wilfully neglected to notify and warn his said Com-
"pany as required by law to parade as aforesaid, and wil-
"fully neglected to parade his Company as aforesaid,
"whereby his said Company omitted to parade, and were
"not Inspected and Drilled as the law requires; to the
"evil example of others, and to the injury of the Militia."

To this the Respondent answered—

"1st. That he received no orders from any superior
"Officer to parade the Company under his command on
"the Tuesday next following the second Monday of Sep-
"tember in said complaint mentioned, for Inspection and
"Drill, as by law he ought in order to make it his duty to
"parade his said Company as said complaint alleges.

"2dly. That on or about the second day of September,
"and more than ten days before the Tuesday following
"the second Monday of September aforesaid, he left Port-
"land, the place of his residence, upon his lawful busi-
"ness and private concerns, by water; and, inasmuch as
"it was possible that adverse winds might delay his return
"in season to cause his said Company to be legally warn-
"ed to parade on said Tuesday following the second
"Monday of September aforesaid, for Inspection and Drill,
"according to his duty and the orders he expected to re-
"ceive to do the same according to military usage and
"the uniform practice as it respects him; and that in
"order to prevent any neglect of duty and to make all
"the provisions in his power, that his said Company
" should be paraded for Inspection and Drill in manner
"as in said complaint mentioned, he sent a message and
"order to Henry M. Minot, his first Lieutenant, to per-

"form the duty which would be incumbent upon him in "calling out and parading his said Company, on the Tues- "day aforesaid, in case he shall not have it in his power "so to do by reason of absence.

"And said Small further says, that he had no pen, ink, "or paper, and could not procure any when he sent the "message and order aforesaid, and therefore was obliged "from necessity to send a verbal order to said Minot as "aforesaid.

"And said Small further says, that his said message and "order was delivered to said Minot about the fourth day "of said September, and more than eight days prior to "the Tuesday aforesaid.

"And said Ebenezer Small further states, that he did "not return from his said voyage by water until it was too "late to warn his said Company to parade as aforesaid, "on the Tuesday aforesaid, and he was in a state of ill "health when he did so return.

"3dly. That if there has been any omission of duty by "reason of the premises, on the part of said Ebenezer "Small, it has arisen through *necessity*, and is *justifiable*, "or at least excusable in him, and could not be, in any "wise, *wilful* on his part."

In support of the prosecution it was proved that the Respondent had neglected to parade his Company as alleged, and that the Company were not paraded for annual Inspection and Drill, as contemplated by law. The Colonel of the Regiment, testified that he called on the Respondent the day succeeding the time designated for the annual Inspection and Drill; and Respondent then offered as an excuse for not parading his Company, that he had received no orders, from his superior in office, to do so—also, that he had not been furnished with the requisite blanks therefor. To which the Colonel replied, that blanks had been left with the Adjutant of the Regiment for distribution, and the Adjutant had furnished Lieuten-

ant Minot with blanks, as he, the Respondent, had requested to have done. The Respondent then said, he was sick at the time, and on that account the Company had not been called out. Respondent did not mention to the Colonel, that he had been *absent* from home, so as to be prevented from parading his Company. By another witness, introduced by the Respondent, it appeared that the Lieutenant had received the blanks from the Adjutant, as before stated.

In behalf of the Respondent it was in evidence, that he set off in a boat from Back Cove to get rocks from one of the islands in Casco Bay, on the 2d of September, 1830—that before starting, and after the Respondent was on board the boat, he requested an individual standing by—a witness in the case, to carry a message from him to Lieutenant Minot, to turn out the Company for the annual Inspection and Drill, in his, the Respondent's, name,—that at the time, there was no pen, ink, or paper at hand, and the boatmen were in haste to set off; that this was on Thursday; and on the following Sunday the message was accordingly delivered to the Lieutenant, who asked where the Captain was, and added, that he did not think the Company would be turned out. It did not appear with certainty whether the Respondent did or did not return from the islands, in season to notify his Company according to law. But he inquired on his return of the bearer of his message, if the message had been delivered, and was informed that it had been, and also of the Lieutenant's reply. On hearing the reply, Respondent observed, that he thought the Lieutenant would have turned out the Company. It was also in evidence, that the Respondent was usually gone four or five days when he went to the islands, and that he was unwell about the time of his return from the islands.

James D. Hopkins, Esq. Counsel for the Respondent, contended—

1st. That the Respondent had no orders from his superiors in office to parade his Company on the day alleged, and therefore was not bound by law to do so.

2dly. That he was absent from home, and therefore was not bound to issue orders for the parade of the Company. The Captain might justifiably, be absent on the day designated for military duty, by the command of a superior, or by necessity. Under such circumstances, and in the absence of the Captain, the duty to parade the Company, if any existed, devolved on the Lieutenant, and, the Lieutenant was responsible for the failure, but not the Captain.

3dly. That the Respondent did all in his power, to have the Company paraded, before leaving for the islands. He issued his order therefor to the Lieutenant, and the evidence is, the Lieutenant received that order. The Respondent did not return in season to warn out the Company himself, and the neglect was on the part of the Lieutenant.

4thly. That the Respondent was disabled by sickness from calling out his Company, and was therefore excusable, if he did return in season to issue his orders.

The Division Advocate argued in reply—

1st. That the Respondent was bound to issue his warrant for the parading of his Company for annual Inspection and Drill, without the order of a superior—And cited, Militia Laws, sec. 2, of Act passed Feb'y. 28, 1825. He is guilty of a neglect of duty as charged, in that he did not use reasonable exertions to do so before setting off for the Islands. Knowing of his contemplated absence before going to the boat, he should have used the precaution of issuing his warrant before that time, not to his Lieutenant, but to a non-commissioned officer or private of his Company.

2dly. That the Respondent did not issue a competent order at any time, for the parading of his Company on

the day alleged. That if he had issued a competent order, and to a competent person, or even an informal order, to one bound to obey it, and it had failed, he would have been furnished with some plausible ground of excuse and justification. The order was in itself defective, and issued to one who was not bound to obey it. The failure of obedience to such an order, on the part of a person not bound to obey it, could furnish no justification or excuse, for the Respondent, nor relieve him from the charge of culpable negligence.

3dly. That the command did not devolve on the Lieutenant in a manner to authorize him to issue a warrant for the parading of the Company.

4thly. That the sickness of the Captain was not such as to prevent him from issuing the necessary warrant. That the proof throughout indicated extreme negligence and disregard of his duty.

Opinion of the Court. The Act of February 28th, 1825, ch. 319, sec. 2, requires, that every Commanding Officer of a Company shall parade his Company on the Tuesday following the second Monday of September annually, at one o'clock P. M. for Inspection and Drill; and on one other day in the afternoon for Company discipline.

This duty is prescribed to the Captain of the Company, if there be no vacancy in that office, to perform. It requires no previous order from any superior Officer, because the law itself regulates the duty. The provision is peremptory, and the rule imperative. The Captain cannot devolve this duty on a Subaltern, so as to discharge himself from the obligation.

In case of the vacancy in the office of Captain, the Lieutenant becomes Commanding Officer. But it is not competent for the Captain to substitute the Lieutenant as Commanding Officer, so as to exempt himself from the duty of fulfilling the special requirements of law in that

capacity, by any voluntary act, of his own, such as an occasional absence from the limits of his command, on the eve of the period appointed for the performance of the particular duty. By accepting the office, he undertakes that performance, and becomes responsible for the omission.

It was the business of the Respondent to cause his Company to be paraded on the day mentioned in the complaint. The proper course for him to pursue on this occasion, was to issue his orders to some non-commissioned officer or private of his Company, one or more, as pointed out by law. It appears, that he trusted to his Lieutenant to cause this to be done; and that he took pains to have his desire or direction communicated to the Lieutenant. He might have expected, and perhaps had reason to rely on compliance from the Lieutenant; and if the Company had actually been paraded, or if orders had been issued by the Lieutenant, in the Respondent's name, by his request, to a suitable non-commissioned officer or private, to notify the Company to appear, agreeable to the provision of law, it might have been well. But he had no right to depend upon any other Officer for the discharge of his own duty: and, that duty not having been done, he becomes liable for the delinquency. It was evident, that the Respondent contemplated an absence which might last until too late to attend to the service on his return; and his not being in good health then cannot operate as an excuse for neglecting the performance of his duty in season; or for not issuing his orders, if there was any opportunity, after his return; for the state of the evidence does not shew any such degree of indisposition, as to disable him from the discharge of that portion of his duty.

The Respondent was adjudged guilty of the offence charged, and sentenced to be removed from office, and to be disqualified from holding any military office under the State, for the term of one year.

First Military Circuit....December 15, 1830.

Present, CHARLES S. DAVEIS, *President.*
JOHN TURNER, } *Associate*
BARNABAS PALMER, } *Members.*
JOHN FAIRFIELD, *Division Advocate*, 1*st. Div.*

CASE. STATE *vs.* STEPHEN PARSONS, *Lieut. 2d. Reg.* } *2d. Brig.* 1*st. Div.* }

1. An amendment of a Specification material to the description of the offence, by striking out the name of one town and inserting the name of another town, the Respondent not being present to make answer and defend, and having moved out of the Military Circuit, not allowed.

This was a trial had at a session of the Circuit Court Martial, for the First Military Circuit, commenced at Limerick, within the First Division of the Militia of Maine, on the fifteenth day of December, A. D. 1830.

The Charge preferred against the Respondent, was for Disobedience of Orders.

The Specification set forth, that the said Stephen Parsons, being Lieutenant of the Second Regiment, Second Brigade, First Division, in the legal command of the Company of which he was Lieutenant, and being duly ordered by the Colonel, John Pike, 2d, commanding the Regiment, to call out the Company to meet at the house of Paul Burnham, in Newfield, within the bounds of the Regiment, on Friday October 8th, 1830, at 6 o'clock, A. M. for Military Inspection and Review; neglected and refused so to do.

Lieutenant Parsons did not appear. Service had been made by copy of the Charge and Specification and the order for the Court Martial thereon, on the 10th of November, 1830—by Ichabod Jordan, Deputy Sheriff, according to the direction of the Division Advocate.

The Division Advocate shewed in evidence, an order

from Brigadier General Henry B. C. Greene of the Second Brigade, First Division, dated September 18th, 1830, to Colonel John Pike, 2d, to parade the Second Regiment on Friday, October 8th, 1830, for Military Review, Inspection, and Discipline.

Colonel Pike testified, that he received the above order, and issued an order to the Adjutant of the Regiment, Israel Piper, to require the several Commanding Officers of Companies in the Second Regiment to parade their respective Companies at the dwelling house of Paul Burnham in Parsonsfield, on Friday, October 8th, at 6, A. M. for Regimental Military Review, Inspection, and Discipline.

The Adjutant, Israel Piper, testified, that he received the foregoing order; and gave notice to Lieutenant Parsons on the 21st of September to appear according thereto by an order written in similar form. The Company did not parade. Piper had been Captain of the Company; was appointed Adjutant on the 18th of September, and qualified on the 20th. At the same time that he communicated the aforesaid order, he also gave an order to call out the Company to supply the vacancy of Captain. This order was complied with, and a Captain was chosen and received his Commission on the 7th of October.

The Division Advocate moved for leave to amend the Specification by inserting *Parsonsfield* instead of *Newfield.*

It appeared that the said Parsons had removed out of the limits of the Circuit to reside in the County of Kennebec; and the Court did not think proper to grant the motion. The prosecution was accordingly dismissed.

CASE. STATE *vs.* SAMUEL MOODY, *Captain 4th. Reg. 2d. Brig. 1st. Div.*

1. The Court will allow the return of service made on a Respondent, to be amended according to the fact, to shew the capacity of the Officer by whom it is made and signed.

2. Service of copies on the Respondent, by a Deputy Sheriff, adjudged sufficient.

3. An order in writing, with the name of the Officer for whom it is intended on the back of the order, is sufficient, although the name is omitted on the inside.

This was a trial had at the session of the Circuit Court Martial for the First Military Circuit, holden at Limerick, on the fifteenth day of December, A. D. 1830.

The Charge preferred against the Respondent, was for Disobedience of Orders.

The Specification set forth an order of Col. George Small, Jr. Commanding Officer of the Fourth Regiment, Second Brigade, First Division, on the 30th day of September, 1830, to Capt. Moody, to call out his Company at Limerick, on Thursday, October 7th, for Military Inspection and Review; and alleged neglect and refusal.

Capt. Moody had filed no answer; and did not appear. On inspecting the return of notice, it seemed, that notice was served upon him on the 9th of November by leaving the usual copy by Ichabod Jordan, without any description or addition shewing that said Jordan was a public officer; and it was not a certificate under oath; and it was the opinion of the Court that the return of notice served by a simple individual, and not sworn to by him, was not sufficient.

It was suggested however, by the Division Advocate, that Ichabod Jordan was a Deputy Sheriff, and he offered his affidavit to the fact, and that the copy was served by him in that capacity; and he moved for leave for the said Jordan to amend his return by the addition of his description as an officer. The Act of

Feby. 24, 1827, ch. 367, constituting Circuit Courts Martial requires, that the Division Advocate shall cause the Respondent to be served with a copy; but contains no direction respecting the manner of the service. It was thought by the Court, that the service by a Deputy Sheriff, as a general sworn officer, authorized to serve precepts from lawful authority, might be sufficient; and the certificate was allowed to be amended accordingly; and Capt. Moody being called, and not appearing, was defaulted.

Upon the evidence it appeared that Colonel Small had given Capt. Moody verbal orders to call out his Company on the 7th of October, twenty days previous. He also made a written order to the same effect and gave it to the Adjutant, Henry Dimmick, with direction to deliver it to Capt. Moody as much as fifteen days before the time fixed. The Adjutant, who was a member of Bowdoin College, was absent, and there was no direct evidence that the order was communicated by him; but Capt. Moody stated to the Colonel, that he had received the order, and mentioned that his name was not contained in it; and made no other objection to it. The Colonel then repeated the verbal order.—It was also testified by Col. Solomon Strout, that five or six days before the muster, Capt. Moody told him Dimmick had handed him, Small, what he, Dimmick, called an order; that he did not consider it such himself; and said his name was not in the order; and that he would let Col. Small know how to make out an order. Col. Strout was one of the Selectmen of Limington, where the Company belonged, and informed Capt. Moody that he should be ready to comply with his requisition for rations. Capt. Moody said he should attend to his own business. On the muster day Capt. Moody was present as a spectator, but his Company was not called out; and being inquired of concerning his company, said they were in better business;

and that they never should go into the field while Col. Small commanded the Regiment. It was also testified that at the election of Captain when he was chosen, or at the training previous, Moody said it was a pity if somebody could not be chosen Captain who could avoid calling the Company out, and yet get clear of a Court Martial. Abijah Woodsum, Ensign of the Company, testified to a similar declaration of Capt. Moody to a number present previous to the election; and that ten or eleven days before the muster, Capt. Moody shewed him the written order, said it was not correct and that he should not attend to it; his name was not in it. Afterwards on the muster day he shewed the order and his name was on the back.

It was the opinion of the Court that the name of the officer to whom the order was addressed being written on the back, would answer; and that the proof of the order and the delinquency was sufficient. Captain Moody was accordingly adjudged to be guilty and sentenced to be removed from office and to be disqualified from holding any office in the Militia for twelve years.

First Military Circuit....June 14, 1831.

Present, CHARLES S. DAVEIS, *President.*
JOHN TURNER, } *Associate*
BARNABAS PALMER, } *Members.*
JOHN FAIRFIELD, *Division Advocate, 1st. Div.*

CASE. STATE *vs.* DANIEL S. HILL, *Lieut. 4th. Reg. 1st. Brig. 1st. Div.*

1. An Officer who has appeared on the field of parade under the Commanding Officer of a Regiment, is obliged to perform duty for the day, unless excused by him.
2. If an Order be understood by the Officer to whom it is addressed, as directed to him, he will be holden to obey it, although his name is mistaken and he is addressed by a different name.
3. On a Regimental Parade for Inspection and Review, the Colonel being absent for whatever cause, the authority of the highest Field Officer present in actual command of the Regiment, is to be duly obeyed as the proper Commanding Officer.

This was a trial had at a session of the Circuit Court Martial for the First Military Circuit, convened at Kennebunk, within the First Division of the Militia of Maine, on the fourteenth day of June, A. D. 1831.

The Charges were—1st, for Neglect of Duty; 2nd, Unmilitary Conduct; and 3dly, Disobedience of Orders.

The Specifications under the two former Charges were substantially the same; and set forth that the Regiment being called out for Inspection and Review on the 1st of October, 1830, at Kennebunk, and the said Hill being on duty in the Regiment and having the command of a Platoon, quitted his post and left the field, in which the Regiment was paraded, and the soldiers under his command, without the leave or consent of any superior officer, and neglected and refused to perform further duty during the time which the Regiment continued paraded.

The Specification under the third Charge contained the same allegation with the addition, that the said Hill was duly ordered by Lieut. Col. Archelaus F. Symonds then Commanding Officer of said Regiment, to return to his post and to the performance of his duty, which order he then and there neglected to obey.

The answer stated in the first place, that the Respondent was not by law liable to perform military duty on said day. It denied the several Charges, and as to the third, alleged that he duly obeyed all orders issued to him at the time and place set forth, and that he did not unnecessarily and without the leave or consent of a superior officer quit his post, as set forth in the Specification. He further alleged that he was unable to do and perform military duty on that day and that he was duly discharged therefrom by a superior officer.

It appeared that the Regiment was paraded for Inspection and Review on the 1st of October, 1830, the Colonel, Smith, being absent, under the command of Lieut. Col. Symonds. Lieut. Hill was present with the Company commanded by Capt. Hobbs to which he belonged, and was stationed in the command of a Platoon. After noon the Regiment was dismissed by the Lieutenant Colonel for an hour to take refreshment, and order was given by him to stack arms. When the Regiment assembled in the afternoon, Capt. Hobbs and Lieut. Hill were absent from their respective stations. They were both sent for and Capt. Hobbs returned to his post, but Lieut. Hill did not. It appeared that he remained on the field as a spectator during the afternoon.

The Adjutant testified, that being directed by the Lieut. Colonel to order Capt. Hobbs and Lieut. Hill back to their stations he rode down the line and found them standing together. While he was addressing the order to Capt. Hobbs, Lieut. Hill walked away. The Adjutant then addressed himself to Lieut. Hill, calling him, as he

testified, "Lieut. *Hill*," or "Lieut. *Kimball*," he could not be certain which, and delivered the order; to which Lieut. Hill replied, "that is not my name." It was from this reply that the Adjutant was led to doubt whether he addressed Hill by his proper name. The Adjutant, as he testified, ordered Lieut. Hill by one name or the other, to take his place, as he also did Capt. Hobbs, and the Captain obeyed,—and the Adjutant further testified that Lieut. Hill was so near that he must have heard what he said. Capt. Hobbs observed to the Adjutant, (Perkins) that he could not do any thing with Lieut. Hill, because he, Hill, had only returned the evening before.

Captain Hobbs testified that either on the night before the Review, or on the same morning, Lieut. Hill informed him, that he was not well enough to do duty. Capt. Hobbs told Lieut. Hill that he wanted the Company to appear as well as he could; and that Lieut. Hill might march into the field, and then retire. Capt. Hobbs said he considered his authority to discharge Lieut. Hill as extending until the Regiment was formed, and, perhaps, until the Colonel came on to the field; but that afterward, he considered Lieut. Hill under the Colonel's command. He stated that Lieut. Hill consented to appear at his request, and refused to do so, unless he, Capt. Hobbs, would discharge him when he had marched the Company into the field for parade.

By the evidence offered for the Respondent, it appeared that he had been absent some months on business, and returned home the evening before the Review; that he was then unwell, and told the Captain, who came to see him and requested him to appear and perform his duty on the following day, that he was not able: that Capt. Hobbs urged him to appear and to march into the field, and promised that he would then release and dismiss him. In the morning he was still unwell, and one of his neighbors advised him not to equip himself. He

said that the Captain wished him to, and he would; and that the Captain would afterwards discharge him. The witness told him, that after he got into the field he would be under somebody else:—the Respondent said he could not, or should not, do duty all day.

It appeared further in evidence in behalf of the Respondent, that he had served six or seven years; and that he had the character of being a good Officer, and had been distinguished for his attention to duty.

It was contended by *George Hussey*, Esq. his Counsel, that the Respondent was not obliged to perform duty on that day, on account of his having been absent so long, and having only returned the evening before; that he was not bound to act under and obey the Lieutenant Colonel, as there was no vacancy in the office of Colonel, and it did not appear that the Colonel was absent from the limits of the Regiment; that the Respondent only appeared in the field by agreement with the Captain; that he was entitled to his discharge according to that agreement, after appearing; and that he stayed longer than he engaged; that the order by the Adjutant was not addressed to him by his right name; and in case of sickness, there is a right to leave without the consent of officers. It is allowed upon evident and urgent necessity. Maltby, p. 179, art. 44—and page 181, art 50. He urged also the general good character and military conduct of the Respondent.

The Division Advocate did not contend it was an aggravated case, but insisted that the charge was made out; that an Officer was not entitled to the same sort of notice as a private; that having appeared, he could make no objection on that score; and that the agreement with Capt. Hobbs amounted to nothing. While he was under Capt. Hobbs's command, it might have been competent for Capt. Hobbs to excuse him for part, or the whole of the day; but that power ceased, when

the Colonel took the command. Lieut. Hill was detached from the command of Capt. Hobbs, and posted at the head of a platoon. If he were unwell, as the Division Advocate admitted in some degree he might have been, he was not satisfied that he was too unwell to do Military duty—at least not so much so but that he might have applied to get excused.

The opinion of the Court was, that the Respondent having voluntarily appeared in the field as an Officer, and taken his station in the Regiment, under the command of the Lieutenant Colonel, was required to perform his duty for the day, unless excused by the Commanding Officer of the Regiment. Any indulgence he might have claimed, on account of his having so recently returned, was waived by his consent and appearance in this manner. In his state of health on that day, it is reasonable to suppose, that if the Respondent had applied to the Commanding Officer of the Regiment for a discharge from further duty for that reason, upon a proper representation, his request would have been granted. The Respondent withdrew himself, however, without permission; for no effect of that kind could be given to the assurance of the Captain on the evening before, after the command of the Regiment was assumed by the Lieutenant Colonel. It appeared sufficiently that the Respondent was well enough to have been able to make his personal application to the Lieutenant Colonel for that purpose. It was no matter why the Colonel was not in command. The Respondent was bound to obey the authority of the highest Field Officer present in actual command of the Regiment. The order to the Respondent delivered by the Adjutant, was intended for him, and addressed to him, and so understood by him, whether his surname was mistaken or not; and it was disobeyed by him without offering to assign any proper reason.

It was, therefore, adjudged that the Respondent was

guilty of the several Charges and Specifications alleged against him; but the Court considering the evidence offered in his behalf, that he had served a number of years with credit as a faithful and meritorious Officer, that this was the first occasion on which any cause of complaint had appeared against him, and that he was not probably in good health at the period, sentenced him to be reprimanded for his misconduct in Regimental Orders.*

CASE. STATE *vs.* CLEMENT NOBLE, *Lieut. 4th Reg. 1st Brig. 1st Div.*

1. Whether a case of complaint upon the Act of March 5, 1829, against the Commanding Officer of a Company for not paying to the members of the Company money received of the Selectmen for that purpose, is cognizable by a Court Martial. *Quære.*
2. If it be the duty of the Commanding Officer of a Company to pay over to the members of the Company the money provided by law to be paid on days of Inspection and Review on behalf of the Selectmen or town to which the Company belongs, it seems that such duty may be discharged by paying the money received, through the Commanding Officer of the Regiment.

This was a trial had at a session of the Circuit Court Martial for the First Military Circuit, convened at Kennebunk, within the First Division of the Militia of Maine, on the fourteenth day of June, A. D. 1831.

The Charges were—1st, Disobedience of Orders; 2nd, Neglect of Duty; 3d, Unmilitary Conduct.

"CHARGE 1st.—Disobedience of Orders."

The Specification under this Charge set forth, "That "on the first day of October A. D. 1830, at Kennebunk "aforesaid, the said Regiment being then and there call-"ed out for Inspection and Review, and the said Noble

*Vide case of State *vs.* Joshua Small, reported in this volume.—*Ed.*

"being then and there on duty in said Regiment and hav-
"ing the command of the Company aforesaid, the Captain
"or Commanding Officer thereof, Captain Joseph Taylor,
"being then absent from the State, and having then and
"there received from the Selectmen of said town of
"Kennebunk the sum of ten dollars and fifty cents, it
"being twenty-five cents for the use and benefit of each
"of the Officers and soldiers under his command as
"aforesaid, was then and there ordered by Lieut. Col.
"Archelaus F. Symonds, then Commanding Officer of said
"Regiment, to pay the money received as aforesaid to
"the soldiers under his command as aforesaid, which
"order the said Noble then and there neglected and re-
"fused to obey."

"CHARGE 2d.—Neglect of Duty."

The Specification under this Charge set forth, "That
"on the first day of October A. D. 1830, at Kennebunk
"aforesaid, the said Regiment, being then and there call-
"ed out for Inspection and Review, and the said Noble
"being then and there on duty in said Regiment, and
"having the command of the Company aforesaid, the
"Captain or Commanding Officer thereof, Capt. Joseph
"Taylor, being then absent from the State, and having
"then and there received from the Selectmen of said
"town of Kennebunk, the sum of twenty-five cents for
"the use and benefit of each of the soldiers under his
"command as aforesaid, then and there neglected and
"refused to pay to each of said soldiers the sum afore-
"said, provided by law to be paid to them while on duty
"as aforesaid."

"CHARGE 3d.—Unmilitary Conduct."

The Specification under this Charge set forth, that the said Noble on the same day being Lieutenant in command of said Company, by the immoderate and intemperate use of spirituous liquors became intoxicated, and was rendered incapable of a faithful and proper performance of his duties.

The Respondent, saving his objections to the authority of the Court, in his answer to the first Charge and Specification, admitted having received the sum of ten dollars and fifty cents mentioned, in bank bills, which he said he had not power to change; and alleged that he paid it to the Lieutenant Colonel, who paid it over to the soldiers.

In answer to the second Charge and Specification, he denied that he was obliged by law to distribute said sums of money to the soldiers so under his command.

The answer to the third Charge and Specification consisted of a denial of the allegation.

The Respondent by his Counsel, *George Hussey*, Esq. also objected, that the subject matter of the two first Charges and Specifications did not come within the cognizance of a Court Martial; and that the same ought therefore to be dismissed.

On hearing the evidence adduced in relation to the two first Charges and Specifications, the circumstances appearing in proof were, that the Regiment having been called out for Inspection and Review on the day mentioned, the Captain of the Company being absent, and Lieutenant Noble present in command, a difficulty arose in the Company on account of the members not receiving the sum provided by law. It was testified by Tobias Walker, one of the Selectmen of Kennebunk, to which town the Company belonged, that it was the usual custom to pay them as soon as they were Inspected. On this occasion the Regiment was dismissed for refreshment before the Inspection took place. Considerable disorder ensued in the Company, and the soldiers refused to do any further duty, assigning the cause, that they had not received the compensation to which they were entitled. On inquiry into the cause by Lieut. Colonel Symonds, he was informed by the Respondent, that he had received the money for that purpose. The Respon-

dent was thereupon ordered by the Lieut. Colonel to pay the money over to the men.

Lieut. Colonel Symonds testified that the Respondent replied that he could not, or that he would not. Lieut. Colonel Symonds then asked the Respondent to give him the money; and the Respondent then delivered the amount of ten dollars and fifty cents to him, chiefly in bank bills; and the Lieut. Colonel then distributed the amount among the soldiers, for the most part in payments of a dollar, not being able to make the parts of a dollar in specie, to as many as would join to receive it in that manner; and by that means the payment was made, and the order of the Company restored.

Tobias Walker testified further, that he was present at the Review, as one of the Selectmen on behalf of the town for the purpose of paying the money provided for the members of the Company; and that he had with him the sum requisite, in bank bills of different denominations, and some specie; that he tried to get this money changed while there, without success; and being at a loss how to distribute it, he requested the Respondent to take it and pay it over to the soldiers; who were then dismissed. The Respondent told the witness that *he* had better do it; but at his request consented to receive it for the purpose of paying it. The witness also testified that the Respondent then endeavored to get the money changed by applying to several persons present; but was not able to obtain specie; that the Respondent was evidently embarrassed; and that he could not have got the bills changed on parade.

William Jefferds, Jun'r. Quarter Master of the Regiment, testified that he saw the Respondent at this time and asked him why he did not pay the money; he replied that he had tried to get it changed, but could not; and seemed to be nervous. The witness then went and acquainted the Lieut. Colonel, who returned with the wit-

ness and told the Respondent to give the money to the men; the Respondent replied, as the witness testified, that he could not get it changed; Lieut. Colonel Symonds then asked him for the money, and the Respondent gave it to him.

Evidence was also offered in support of the last Charge and Specification; opposing testimony was introduced accounting for the appearance and behaviour of the witness on that day in the judgment and belief of the witnesses, and from their acquaintance with him, without supposing intoxication; and the third Charge and Specification were not considered to be supported by sufficient proof.

The case was submitted without argument; and the view taken of it on the part of the Court in respect to the two first Charges and Specifications, was as follows:

Without undertaking to determine the legal question, whether the subject matter of those Charges and Specifications came within the proper cognizance of the present Court Martial; or to decide upon the sufficiency of the allegations, if it were necessary to consider that point carefully,—which the state of the evidence did not in their opinion demand, it did not appear satisfactorily upon the whole evidence that a case of delinquency was made out against the Respondent.

The Act of the Legislature passed March 5th, 1829, provides that upon the requisition of any Commanding Officer of a Company for that purpose at five days' notice, the Selectmen of towns and Assessors of plantations shall pay at the place of Inspection and Review to each officer and member of such Company, belonging to such town or plantation, who shall then and there appear and perform military duty, the sum of twenty five cents; and that every town or plantation which shall fail to pay said sums as aforesaid shall forfeit to the use of said Company a sum equal to twenty five cents for every such person,

who shall do duty on such Inspection and Review, to be sued for and recovered by the Clerk of said Company before any Court of competent jurisdiction.

The requirement made by this provision appears to be rather of Municipal, than Military, obligation. The sum of twenty five cents, substituted as a commutation for the rations established by the fifth section of the Act of Feby. 25, 1824, which is repealed by the present Act, is directed to be paid by the Selectmen of towns, &c. to each officer and member of the Company. It may be doubtful whether a town or plantation can devolve the performance of this duty upon a Commanding Officer of a Company, so as to acquit themselves; or whether the Commander of a Regiment has power to require the performance of this service from the Commander of a Company. The law does not determine during what part of a day this duty shall be performed. If the Respondent is to be considered as having assumed to act on behalf of the town at the request of one of the Selectmen present, or as their Agent, he may as well be considered as having discharged the responsibility thus incurred by paying the money in his possession to the individuals of the Company severally entitled to it, through the medium of the Lieutenant Colonel. It may be presumed, that this was satisfactory to the Selectman who was present for the purpose, but had been unable to accomplish it in consequence of not having been careful to provide himself with specie; and every one of the Company received the sum to which he was entitled, although not in season to prevent discontent, yet within time that may be deemed to be allowed by the law, and at all events to their final satisfaction. For the cause of this delay the Respondent does not appear to be in default. It was the duty of the Selectmen to have been prepared with the money to pay in convenient parts of a dollar. The remedy pointed out by the Legislature is a direct one by the

Clerk of the Company against the town or plantation; and although this penalty may not be absolutely exclusive of any other proceeding that may be important to give effect, as a sanction, to this provision, under the proper operation of the laws for organizing and governing the Militia, yet there seems to be nothing in the present case that calls for the determination of any further question.

Respondent adjudged Not Guilty.

APPENDIX

OF

PRACTICAL FORMS.

Form of Complaint against an Officer, to be filed with the Division Advocate.

To Major A—— B——, Division Advocate of the —— Division of the Militia of Maine.

PORTLAND, JUNE , 1831.

The Complaint of C—— D——, of ———, who is a [here state whether the Complainant is a Private, or Officer] in a Company of ——— belonging to the ——— Regiment, ——— Brigade, and Division aforesaid, respectfully represents—

That E—— F—— being on the ——— day of ———, in the year of our Lord 183— an officer in said Militia, viz.—a ——— [here state the rank of the person accused, the Company, Regiment and Brigade to which he belongs] and Division aforesaid, was guilty of ——— [here state the offence—being particular as to the time, place, and occasion of it.]

Wherefore your Complainant requests, that Charges and Specifications may be preferred against the said E—— F——, for the offence above mentioned, and that he may be otherwise dealt with as the law in such case provides. (Signed) C—— D——.

Form of Charges and Specifications, to be filed by the Division Advocate, with the Adjutant General, on complaint made for that purpose.

MILITIA OF MAINE.

——— *Division.*

April ——, 1831.

Charges and Specifications preferred against E—— F——, Captain of a Company of Infantry in the ——— Regiment, ——— Brigade and said ——— Division, by A—— B——, Division Advocate of said Division—on the complaint of C—— D——, who is a Private in [or Captain of] a Company of Infantry, belonging to said ——— Regiment.

Charge 1st.—Neglect of Duty.

Specification 1st.—In this—the said E—— F——, on the ——— day of September, 1831, was Captain as aforesaid, of the Company aforesaid, and being so in office, it was his duty on the Tuesday following the second Monday of September aforesaid, to parade his said Company at some convenient place, within the limits thereof, at one of the clock in the afternoon, for Inspection and Drill; yet the said E—— F——, regardless of his said duty, wholly neglected so to parade his Company, or to give the proper orders therefor, and in consequence thereof, said Company entirely lost the benefit of the annual Inspection and Drill contemplated by law.

Specification 2d.—In this—the said E—— F—— being in office as aforesaid, it was his duty to parade his said Company for Company Discipline, on one other day, between said day of Inspection and Drill, and the annual Review of the Troops of said Division, in Brigades, Regiments or Battalions, provided by law; yet the said E—— F——, regardless of his said duty, wholly neglected to parade his Company for the purpose last aforesaid, to the great injury thereof and in evil example to others.

Charge 2d.—Disobedience of Orders.

Specification.—In this—the said E—— F—— being Captain of the Company aforesaid, was paraded on the ——— day of ———, in the year of our Lord 1831—at ——— with his said Company, and in the Regiment aforesaid, for Regimental Review and Inspection; and was then and there ordered by G—— H——, who was then and there Colonel and Commanding Officer of said Regiment, to wheel his Company from the line of said Regiment and [here fully describe the order] all which the said E—— F—— was in duty bound to obey and perform; yet the said E—— F—— in contempt of the order of the Commanding Officer of said Regiment, disobeyed the same, and refused to perform said evolution—in evil example to others.

All of which is respectfully submitted, for the consideration of the Commander in Chief.

A—— B——, *Division Advocate of the —— Division.*

The foregoing form will require but little variation, save in the substance of the Charges, to embrace any case. Precision in time, place and circumstance, as connected with this offence, is what is most needful.

For forms in particular cases—the following cases, reported in this volume, may be consulted to advantage. State *vs.* J. Stimson, p. 7,—State *vs* J. McIntire, p. 12,—State *vs.* I. Woodman, p. 25,—State *vs.* S. Pattee and others, p. 32,—State *vs.* William Moses, p. 45,—State *vs.* Joshua Small, p. 57,—State *vs.* John Akers, p. 61,—State *vs.* Ch. Wadsworth, p. 66,—State *vs.* Eben'r. Small, 71.

Form of a Judgment and Sentence of Court.

STATE OF MAINE.

CIRCUIT COURT MARTIAL.

First Military Circuit.

Convened at ——— within the ——— Division, on the ——— day of ———, A. D. 1831, pursuant to General

Orders of the Commander in Chief, bearing date the —— day of ——, A. D. 1831, for the trial of E—— F——, Captain of a Company of ——— in the ——— Regiment, ——— Brigade and Division aforesaid, on Charges and Specifications preferred against him by Major A—— B——, Division Advocate of said Division, on the complaint of C—— D——, Captain of a Company in the ——— Regiment, —— Brigade and Division aforesaid.

Present, G—— H——, *President.**
I—— J——, } *Associate*
K—— L——, } *Members.*

The Court having considered the Charges and Specifications preferred against the said E—— F——, and the evidence adduced by the Division Advocate in support thereof; and also the answer and evidence furnished by the said E—— F——; (and also the arguments of Council in behalf of the Government, and in behalf of the Respondent,) do adjudge the said E—— F—— Guilty of the First Charge, and of the First Specification of the First Charge—and Not Guilty of the Second Specification of said Charge.

And of the Second Charge—and Specification of said Charge, the Court adjudge the said E—— F—— Not Guilty.

And of the Third Charge and the two Specifications of the Third Charge, the Court adjudge the said E—— F—— Guilty.

And the Court do further adjudge and sentence the said E—— F—— for the offences whereof he is found guilty, to be removed from the office which he now holds in the Militia of Maine, and to be disqualified for, and incapable of holding any Military office under this State, for the term of ——— years.

In testimony to the Commander in Chief, of the fore-

*In the absence of the President, the Senior Member of the Court ranks, and signs the Judgment and the Sentence of the Court, as "*Senior Officer and President ex officio.*"

going Judgment and Sentence of the Court, I have hereunto affixed the seal of said Court.

G—— H——,
President of the
First Military Circuit
Court Martial.

SEAL.

If the Respondent produces evidence in mitigation, or partial justification of the offence charged, or evidence of any nature, by which the sentence of the Court is influenced favorably to the Respondent, it is proper for the Court to include in their judgment as certified, an allusion thereto, after stating the judgment as to the question of guilt, as follows—"In consideration of the inexperience of the Respondent, or of his misapprehension of duty—or of the favorable motives which influenced him, as appears from the evidence adduced in his behalf, the Court have mitigated the sentence, &c. &c. (as the case may be) insomuch that they adjudge him Guilty of, &c. and sentence him to be," &c.

Form of Subpoena for Witnesses.

STATE OF MAINE.

——— *To* ——— *O*—— *P*——, *and Q*—— *R*——,

Greeting—

You are hereby required, in the name of the State of Maine, to make your appearance before the Members of the Circuit Court Martial for the ——— Military Circuit, to be holden at ——— in the town of ———, within the ——— Division, to give evidence of what you know relating to Charges and Specifications of Charges, preferred against ——— then and there to be heard and tried.

Hereof fail not, as you will answer your default under the pains and penalties of the law in that behalf provided.

Dated at ———, the ——— day of ———, A. D. 1831. A—— B——, *Div. Adv.*
——— *Div'n.*

———

Form of answer to be filed by the Respondent with the Division Advocate, as required by sec. 4, of the Act of Feby. 24, 1827, establishing Circuit Courts Martial.

STATE OF MAINE.

SIXTH DIVISION.

APRIL ——, 183—.

The answer of E—— F——, Captain of a Company of Infantry in the ——— Regiment, ——— Brigade, and ——— Division of the Militia of Maine, to the Charges and Specifications of Charges preferred against him by Major A—— B——, Division Advocate of the ——— Division, on the complaint of C—— D——; which Charges and Specifications are to be heard and tried by the Circuit Court Martial, for the ——— Military Circuit, next to be holden at ———, within said Division, on the ——— day of ———, A. D. 183—.

The said Respondent for answer, says—

1st. That said Court has not cognizance of said Charges and Specifications, nor any part thereof, because [here state the reason, if any there be, why the Court should not take cognizance of the offences charged.]

2dly. Said Respondent answers, That he is not guilty of the First Charge and the several Specifications thereof, nor of either of them, preferred against him as aforesaid, because no such order as therein is set forth, was ever issued to him, by the said M—— N——.

3dly. Said Respondent answers that he is not guilty of the Second Charge and the Specification thereof, pre-

ferred against him, because the order therein set forth was not a legal one, and such as he was bound and required by law to obey, in that it was against Military usage and tending to degrade your Respondent as an officer.

All of which, said Respondent is ready to verify, and prays may be inquired of by said Court.

E—— F——.

The foregoing form will admit of being filled with any substance necessary to the defence of the accused. Although the precision of special pleading is not required to be observed in answers to Charges and Specifications, it is essential that the answers should be equally particular with the Specifications of the Charges.

FORM OF PAY ROLL.

PAY ROLL of the Circuit Court Martial, for the ——— Military Circuit, convened at ———, within the ——— Division, on the ——— day of ———, A. D. 183—, pursuant to the General Orders of the Commander in Chief, bearing date the ——— day of ———, A. D. 183—, for the trial of ———.

For whom Taxed.	Capacity.	Days Attendance.	Miles of Travel.	Pay for Attendance.	Pay for Travel.	Miscellaneous Services.	Total.
G—— H——,	Member of Court.	three.	ten.	$9 —	$1 00	———	$10 00
I—— J——,	"	"	fourteen.	$9 —	$1 40	———	10 40
K—— L——,	"	"	seventeen	$9 —	$1 70	———	10 70
O—— P——,	Division Advocate	"	eleven.	$9 —	$1 10	———	
" "	"	———	———	———	———	Drawing Charges & Specifications & filing same $——	
" "	"	———	———	———	———	Preparing case for trial $——	$
" "	"	———	———	———	———	Subpœna $——	
" "	"	———	———	———	———	Copies of case for service on Respondent $——	
" "	"	———	———	———	———	Recording $——	
Q—— R——,	Marshal.	three.	five.	$9 —	$0 40	———	$9 40
S—— T——,	Orderly.	"	four.	$9 —	$0 32	———	9 32
U—— V——,	Witness.	one.	twenty.	$1 50	$1 60	———	3 10
W—— X——,	Deputy Sheriff.	———	———	———	———	Service of process on Respondent $2 —	2 00
						Aggregate	$

Examined and Certified by us in Court.

G—— N——, *President.*

O—— P——, *Division Advocate.*

Form of a Warrant of Arrest when made on Parade.

To A—— B——, Adjutant, [or here insert the rank of the officer to whom the warrant is directed, and the Regiment, Brigade and Division to which he belongs.]

You are directed forthwith to repair to the quarters of K—— L——, [here insert the rank of the officer to be arrested, the Company, Regiment, Brigade, and Division to which he belongs, as follows—] Captain of a Company of Infantry, in the ——— Regiment, ——— Brigade and ——— Division of the Militia of Maine; you will then and there cause the said K—— L—— to be arrested, by reading this warrant in his presence and hearing, or leaving a copy thereof at his said quarters, that the said K—— L—— may be hereafter brought to answer to certain charges of unmilitary conduct [or whatever the charges may be] preferred against him. Of your doings hereof, make due return to me as soon as may be.

Q—— P——, *Col. 1st. Regt. 1st. Brigade and 5th Div. of the Militia of Maine.*

The return of the officer who makes the arrest may be in the form following:—

August 20, 1831.—Agreeably to this warrant, I have caused the within named K—— L—— to be put in arrest, by reading this warrant in his presence and hearing, (or, as the case may be) leaving an attested copy of this warrant at the quarters of the said K—— L——.

A—— B——, *Adjt. 1st. Regt. &c.*

In relation to arrests, and the course of proceeding thereafter, in order to bring the officer arrested to trial, the following extract from the Laws of Maine, ch. 319, sec. 9, will be sufficient—

"—— No arrest for offences committed on parade shall be legal, unless made by order of the commanding officer present in writing and unless such commanding officer shall within fifteen days exhibit to the competent

authority his complaint in writing, setting forth the cause of such arrest."

The effect of an arrest upon the authority of the officer arrested is subjoined in the following extract from the Laws of Maine, ch. 164, sec. 45, art. 5.

"If any officer, after having been put in arrest, shall presume to exercise any military command, until he is discharged from his arrest, he shall be liable to be tried by a Court Martial, and if convicted, he shall be removed from office."

A TABLE

Of the principal matters contained in this volume.

The reader is requested to make the following corrections, in addition to those noted among the *Errata* on page iv viz.—On page 25, in the abstract of the case numbered 3, for "suppression" read *suspension*. On page 52, in the tenth line, for "1829," read 1827. On page 92, in the eighth line, for "witness," read *respondent*.